Supreme Court, U.S.
FILED
FEB 14 2000
CLERK

(3)

No. 99-1042

In the
SUPREME COURT of the UNITED STATES

Robin and Karen Zahran

Petitioners,

v.

GERALD G. SHCMIDT, JR. individually and the law firm of SCHMIDT, DARLING & ERWIN, MARJAN R. KMIEC, individually, and the law firm of KMIEC LAW OFFICE, ROBERT C. BURRELL, individually and the law firm of BORGELT, POWELL, PETERSON & FRAUN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY TO BRIEF IN OPPOSITION

Robin and Karen Zahran, *pro se*
1301 W. 22nd Street
Suite 815
Oakbrook, Illinois 60523
(630) 573-1000

122pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i.
STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION.....	1
ARGUMENT	
PETITIONERS REPLY TO KMIEC'S RESPONSE.....	1
REPLY TO KMIEC'S STATEMENT OF THE CASE.....	1-4
PETITIONERS REPLY TO KMIEC'S SUMMARY OF ARGUMENT.....	5-6
PETITIONERS REPLY TO KMIEC'S RELIANCE ARGUMENT.....	6-7
PETITIONERS REPLY REFERENCING THE IMPROPER ASSIGNMENT OF JUDGES IN THE COURTS BELOW.....	7-8
PEITIIONERS' REPLY TO KMIEC'S RESPONSE AND ARGUMENT REFERENCING THE IMPROPERLY ADMITTED EVIDENCE.....	8-10
CONCLUSION.....	10
APPENDIX.....	ii-iii

APPENDIX

	Page
1. U.S. DISTRICT COURT for the EASTERN DISTRICT OF WIS., CIVIL DOCKET for Case No. 95-C-CV-334.....	1-6
2. U.S. DISTRICT COURT for the EASTERN DISTRICT OF WIS., Defendant's FIRST AMENDED ANSWERS and AFFIRMATIVE DEFENSES in Case No. 90-C-337.....	7-22
3. U.S. DISTRICT COURT for the EASTERN DISTRICT OF WIS., SPECIAL VERDICT in Case No. 90-C-337.....	23-26
4. ATTORNEY KMIEC'S ASSESSMENT OF ZAHRANS' DAMAGE INTRODUCED IN THE ORIGINAL TRIAL, Case No. 90-C-337.....	27-30
5. U.S. DISTRICT COURT for the EASTERN DISTRICT OF WIS., OPENING STATEMENTS BY Defendants on 12/17/91 in Case No. 90-C-337.....	31-45
6. U.S. DISTRICT COURT for the EASTERN DISTRICT OF WIS., CLOSING STATEMENTS AND ARGUMENTS at JURY TRIAL in Case No. 90-C-337.....	46-67
7. PROCEEDING IN THE DISTRICT COURT EVIDENCING ATTORNEY KMIEC INFORMING JUDGE CURRAN THAT HE WISHES to SUBMIT NEW JURY INSTRUCTIONS and OBJECT to the SPECIAL VERDICT FORM of WHICH THE JUDGE OVERRULED AS HAVE BEEN WAIVED. JUDGE CURRAN WAS	

SURPRISED AS TO HOW KMIEC ARGUED THE CASE TO THE JURY in Case: 90-C-337..... 68-73

8. U.S. DISTRICT COURT for the EASTERN DISTRICT OF WIS., Plaintiffs' MOTION to CONSOLIDATE in Case No.'s 95-C-334 & 95-C-1281..... 74-75

9. AFFIDAVIT OF JERRY ZELLER, ZAHRANS and SECRETLY FRANKENMUTH'S EXPERT WITNESS..... 76-77

10. U.S. DISTRICT COURT for the EASTERN DISTRICT OF WIS., Defendant's TRIAL MEMORANDUM in Case No. 90-C-337.. 78-86

11. U.S. DISTRICT COURT for the EASTERN DISTRICT OF WIS., Plaintiffs' BRIEF in SUPPORT of a MOTION for a NEW TRIAL or ALTERNATIVELY, MOTION NOTWITHSTANDING the VERDICT in Case: 90-C-337..... 87-108

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Jurisdiction in the district court was based on diversity of citizenship under 28 U.S.C. { 1332

The court of appeals had jurisdiction under 28 U.S.C. } 1291 and this Court has jurisdiction under U.S.C. { 1254.

PETITIONERS REPLY TO KMIEC'S RESPONSE

The Petitioners find it necessary to reply to Kmiec's response due to misrepresentations made in his response. .

Reply to Kmiec's Statement of the Case

Kmiec's response brief is no more than an attempt to mislead the Court. Zahrans will reply with specific facts supported by the record.

In the original case, Frankenmuth's affirmative defenses and counterclaim plead general allegation of misrepresentations made by Zahrans in their damage claim after declaring they had paid all damages in full. (App. p. 7-22) The jury, through the special verdict, did not declare Zahrans misrepresented their loss in their sworn proof of loss as Kmiec states. In fact, no one knows what the jury's basis of misrepresentations were. (App. p. 23-26)

Kmiec alleges that Zahrans' petition is full of misstatements but fails to point to any specific misstatement in support of his contentions with the exception of pointing to the jury trial demand in which he misrepresents the facts. A jury trial in this case was set for January 13, 1997 at 9:30 a.m. through the magistrate judge minute order dated May 28, 1996 as appears in District Court docket No. 60. (App.p. 1-6)

Kmiec and his retained damage experts in the original case estimated the damages sustained by Zahrans' farm and introduced evidence at the trial for losses in an amount in excess

of $634,834.92 (App. p. 27-30) These amounts are far in excess of what Zahran's claimed through correspondence and proofs of loss submitted to Frankenmuth relying on experts, contractors and Frankenmuth's own adjusters.

Kmiec should not have taken Zahran's case had he thought it is meritless upon completing his investigation, and should have advised Zahrans accordingly. Nor should he have introduced evidence at trial for damages far in excess of what Zahrans' claimed in their proofs of loss to Frankenmuth before Kmiec was retained and then blame Zahrans for his actions to escape responsibility for damages caused by his negligence.

Kmiec was informed of every dispute Zahrans had before he was retained for representation. Divorce, separation, tax filing, Robin's Zahran's education were never an issue or a part of the evidence in the original action, nor are theses issues relevant or material to the malpractice case, nor were they part of the pleadings or evidence in the original case. Karen endorsed one check and made it payable to the Denmark State Bank (the loss payee), in the amount of $4,000 and endorsed no others contrary to Kmiec's statement.

Kossuth and American Family Insurance Company coverage's were not an issue in the original case. Kmiec's statement is misleading as to the prior claims in that there was no coverage for acts of vandalism by Kossuth and accordingly, it did not consider these losses as covered claims under the policy provisions, nor paid them. Nor was the issue of misrepresentation on the application for insurance in the American Family an issue in the Frankenmuth case, nor is Kmiec's statement that Zahrans' expert acknowledged that Frankenmuth pleadings, referencing misrepresentations by Zahrans, arose out of the proofs of loss submitted for the tornado loss and not the fire is true.

Zahrans' second proof of loss was made upon the assessment made by Morton Builders Corp. (retained as experts

by Zahrans and later by Kmiec) in which it was discovered at a later date that the same expert was hired secretly by Frankenmuth of whom they paid him to be their consultant at the time he was acting as Zahran's expert at the tornado trial and in fact rendered testimony at the original trial in which he contradicted his prior deposition testimony. (App. p.76-77)

Attorney Richter (Kemic's expert) testified that Frankenmuth's policy was ambiguous and therefore Wisconsin Law will interpret the policy to the benefit of the policy holder, not the insurer. Richter testified that Kmiec's failure to raise that issue could be construed as malpractice and negligence. Further, Richter misstated Wisconsin law because Frankenmuth policy does not allow the voidance of policy absence the specific condition of reliance on the insured's misrepresentation as declared in the *Templis* case. *Templis and Walker cases* (cited by Kmiec) did not contain the element of reliance on the insureds misrepresentations in the policy conditions necessary to void the policy.

Frankenmuth's policy, as demonstrated, did require reliance to void the policy. Additionally, Wisconsin Supreme Court overruled the Appeal Court *Templis* decision declaring that no whole voidance of policies is allowed in Wisconsin as it is inequitable and only allowed the voiding of the items misrepresented. Kmiec himself brought that contention to the attention of the court in the original trail but only after the jury was deliberating which was too late as found by Judge Curran. (App. p. 68)

Zahrans have many business interests. A dispute with a bank or filing of a collection action which resulted in settlement did effect Zahran's credit negatively as would a judgement or a finding of misrepresentation, although they don't have to be exclusive. Kmiec's attempts at diversion of the issues should be discarded.

One must wonder if Zahrans, as Kmiec states, have a habit of bringing frivolous and unfounded claims. Why in the world did these attorneys take Zahrans money, quoted them the law, encouraged them to go to court to seek redress, causing them to pay the expense of litigation, and then claim that Zahrans' claims were baseless upon their failure to carry out their duties upon their specific representations.

As to Zahran's education, Kmiec's introduction of irrelevant material, misquoted deposition statement that Zahran never had a chance to inspect, read , or correct after 13 years shows Kmiec grasping for excuses to escape liability even to the extent of using misquoted statements which was not a part of the issues or evidence in the tornado trail.

As to Kmiec's jury trial statement, Zahrans did not waive their jury trial demand and in fact they demanded it upon their motion to consolidate Case No. 95-C-334 and Case No. 90-C-1281 on 3/11/96,(App.p.74-75) as appears on the District Court's docket statement. (App. p.1) Judge Callaghan, in his minute order, granted Zahrans a jury trail to be held at 9:30 on 1/13/97, as appears on the docket No. 60. (App. p. 1). Kmiec's attempts to mislead this court by stating a jury demand was never demanded or granted before Judge Clevert took the case inspite of knowing otherwise as the docket shows should subject him to sanctions.

The courts below did not address the record the arguments in Zahrans' appeal briefs nor properly considered the earlier courts decisions. Kmiec is defending Cohen's actions knowing he misrepresented the facts of filing papers to the Appeal Court, the Supreme Court and his clients and failed to raise important issues on appeal. Kmiec himself argues that Cohen, in behalf of Zahrans, waived certain arguments on appeal.

Petitioners Reply to Kmiec's Summary of Argument

Zahrans, in their petition, showed and demonstrated enough compelling reasons to justify the granting of Zahrans petition. Zahrans' expert was a licensed attorney in the State of Illinois and admitted to the Federal Bar, the Seventh circuit and the U.S. Supreme Court and occasionally tried cases in Wisconsin mainly in the areas of malpractice. If he was unworthy of belief, he shouldn't get away with erroneous unbelievable testimony under oath, nor should he be allowed to practice law in these forums as an officer of the court.

But, the fact is Attorney Gooch's testimony was on point and un-contradicted. In fact it is supported by the record and the original U.S. District Court and the original Appeal Court panel findings. See Frankenmuth's opening arguments (App. p. 31-45) and Kmiec's tardy objections through the motion after verdict (App. p 87-108) in which he raised defenses too late. See Frankenmuth's pre-trial motion (App. p. 78-86). Kmiec's own motion after verdict in the original trial argued to the District Judge everything the appeal court found to have been waived. Simply, Kmiec waived Zahrans' entire defenses as testified by expert Gooch.

Zahrans' petition adequately demonstrated and showed the conflicts of the lower courts' decisions with this court's decisions and with those of Wisconsin Supreme Court and other circuits besides Constitutional infractions on Zahrans' rights by the lower courts enough to justify granting their petition.

Kmiec failed to point out how did Wisconsin law applies to Kmiec's understanding of the law when in fact he cites *Templis* which is inapplicable in this case because the *Templis* policy contract language allows for voiding coverage for misrepresentation in a proof of loss absence reliance. *Templis* policy language however is totally different than that of Frankenmuth policy language which specifically states that to

void Frankenmuth policy, based on misrepresentations, Frankenmuth must prove that it relied on Zahrans' misrepresentations in the adjustment of the claim, a fact Frankenmuth did not prove as found by all the courts below and admitted by Kmiec himself and all the experts.

Kmiec fails to recognize that Karen Zahran's second amended complaint was allowed to be filed of which the defendants responded. Accordingly, even if a jury trial was not demanded or set earlier (which is not the case), a jury demand was therefore timely made pursuant to the different circuits case law and this court decision and opinions as cited in Zahrans' main Petition.

Petitioners Reply to Kmiec's Reliance Argument

Kmiec's argument that reliance is not an element necessary to establish misrepresentation is erroneous as a matter of law in this case for the following reasons. It may in itself proves his negligence because he failed to act based on his erroneous understanding of the policy contract and the law, although Kmiec's current position is opposite his position declared to Judge Curran after the jury retired and in his motion after verdict. (App. p. 68 and 87-108)

First, the policy language contract at issue between Zahrans and Frankenmuth made the reliance by Frankenmuth on misrepresentation by the insured in the adjustment of the claim, including misrepresentations in the proof of loss, a necessary element to void the policy. The *Templis* case, policy language quoted by Kmiec did not, Templis court of appeal went further and stated that the policy could be voided only if the policy language allows for such result. Frankenmuth policy did not allow voidance absence reliance by Frankenmuth on the alleged misrepresentations.

Second, Frankenmuth plead as an element of their defenses and counterclaim that they relied on the alleged

misrepresentations, a fact alleged by Frankenmuth as an element of their defense and counterclaim which needed to be proved at trial. There pleadings and allegations were proved to be untrue at the trial evidenced by the district and the appeal court findings in the original case and orders.

Third, The Wisconsin Supreme Court declared in the *Templis* case that Wisconsin will no longer allow voidance of an entire policy upon finding misrepresentations in the presentations of the claim. Instead it will only allow voidance of those items misrepresented during the adjustment of the claim. The defendants did not raise these defences at the original trial and in fact waived them as demonstrated and found earlier by the original courts.

Kmiec, at page 20, finally admits that Zahrans policy contained reliance as an element necessary to void the policy but falsely misrepresents to this court that *Templis* policy is virtually identical to Zahrans policy, when in fact he knows it is not. As to Kmiec's assertion that reliance on Zahrans misrepresentation was not an issue. Reliance was an element plead throughout by Frankenmuth as an element of the counterclaim as shown. Nor does Kmiec dispute Wisconsin Statute 631.11. (1) (b) (l).

Fourth, Frankenmuth never acted on its policy avoidance declaration. It kept Zahrans' policy in force, took more of Zahrans' premium, kept the old premium, and never refunded Zahrans' premium when it declared the policy void even after it achieved judgement against Zahrans for the refund of the monies paid to the mortgagees. Kmiec waived all these arguments.

Petitioners Reply Referencing the Improper Assignment of Judges in the Courts Below

All of the U.S. District Court Judges for the Eastern District of Wisconsin (Curran, Stadmuller, Randa, Reynolds) recused themselves. Judge Warren was ill, the case went to

Judge Clevert without random assignment as is required by law. All issued orders similar to Judge Curran recusing himself pursuant to 28U.S.C. 455 (b) (1). Judge Clevert should have done the same.

The lower courts in this case failed to address the issues raised by Zahrans in their arguments by accusing the expert witness of giving unbelievable testimony under oath in a Federal Court without pointing to the specifics of where that expert testimony was mistaken, untruthful, or erroneous.

Kmiec admits that Judge Clevert was loud and mad with Karen Zahrans attorney. The Seventh Circuit recently remanded a case in 1998 on that basis alone where Judge Clevert was the presiding judge when he temporarily lost his temper and was out of control. Kmiec's defense such unwarranted behavior and justify it by explaining that Judge Clevert was mad because Attorney Bickley was objecting on issues that did not involve his client. But the record is clear, there were more objections by the defendants' attorneys on issues that did not involve their own clients. Judge Clevert seemed to have been receptive and did not get mad or upset upon raising objections in behalf of other than their clients. He sustained almost all their objections.

The trial was lengthy not because of Zahrans. It was made lengthy only to accommodate the defendants and their attorneys travel and personal vacation schedules presented during trial as the record will show, causing the trial to be interrupted and spanned over four months. Judge Clevert granted Kmiec's motion to set the mode of the trail giving them wide latitude on how to conduct the trial and what evidence to introduce, yet denied such opportunity to Zahrans.

Petitioners' Reply to Kmiec's Response and Argument Referencing the Improperly Admitted Evidence

Immediately before the trial Kmiec moved the court to bar Zahrans from introducing evidence related to the original case. The court precluded Zahrans from calling witnesses to

show that Kmiec failed to carry proper cross examination on the issues relevant to proving Zahrans case and defenses, in effect curtailing Zahrans from carrying proofs based on the case within a case proof used in malpractice actions pursuant to Wisconsin and Federal Law. It is clear the best evidence in malpractice cases is the evidence of what happened in the original case.

Judge Clevert allowed the introduction of immaterial, irrelevant, and inaccurate misquoted deposition transcripts that had no relationship to the allegations, pleadings, disputes or the complaint into evidence. More importantly, all of the issues regarding the disputes between Zahrans on one hand and Old Kent Bank, Buchinger, Providence Washington, James Presentine, Fitzimmons, American Family are distorted and misstated by Kmiec. They were not part of the original case evidence or trial. In fact, admitting them was in violation of F.R.C.P., in particular Rule 402, which served no purpose but extended the trial. On the other hand, Zahrans were precluded from introducing evidence such as sanctions levied against Kmiec for frivolous pleadings in the Federal Courts

The court did not allow expert testimony that was testified to through Attorney Gooch's deposition testimony, but allowed the defendants experts to testify based on speculation or outright misrepresentation of Wisconsin Law even if it was not in their report. The defendants' experts did not read the *Templis* nor the *Walker* policy language to compare it to Frankenmuth policy language to render an opinion, yet they were still allowed to render expert testimony based on these cases purely on speculation.

As to the conspiracy issues, Defendant, Burrell admitted in his deposition and answers to interrogatories that there was a conspiracy between Frankenmuth adjusters to deprive Zahrans of their policy proceeds. Burrell and Kmiec, in lieu of Frankenmuth's allegations of misrepresentation against Zahrans

along with the fire occurrences, had the duty to pursue discovery on these issues and not leave to chance or speculation Zahrans' defenses and proofs as both the fire and tornado litigations were inseparable pursuant to Burrell's opinion. The defendants owed Zahrans a duty to know in order to be able to defend and advise and properly represent their clients. Instead, they were negligent and careless.

CONCLUSION

In summary, granting the petition would put clarity on many issues relating to attorneys and clients relationships as to duties, responsibilities, promises, contracts, legal malpractice expert testimony and the duty of care by attorneys and would give much needed guidance in that particular area of the law, especially where attorney's negligence is becoming so common and in some instances, causing great injustices.

Zahrans demonstrated the impropriety of the lower courts decisions and orders supported by the facts and set forth many reasons for this court to interfere and to set standards for attorney's legal conduct, free of special considerations. This case raises many of the issues that needs guidance and precedent to be set by the Court which would be beneficial in all malpractice cases, insurance contracts, and the enforcement's of their provisions in diversity actions, doctrines of estoppel, waiver, and the assignment of cases in the district and appeal courts along with questions referencing the Constitutional guarantees of equal application of the law and the rights to a jury trial.

Respectfully submitted,

Robin Zahran

Karen Zahran

U.S. District Court
Eastern District of Wisconsin (Milwaukee)

CIVIL DOCKET FOR CASE # : 95-CV-334

Zahran, et al v. Schmidt, et al
Filed: 03/31/95
Assigned to: Judge Charles N. Clevert
Demand: $0,000 Nature of Suit: 190
Lead Docket: None Jurisdiction: Federal Question
Dkt # in USCA Zahran 4/28/98: is : 98-02123
Dkt # in USCA: is a : 97-03710
Cause : 28:1331 Federal Question: Other Civil Rights

Page 7

3/11/96	47	MOTION by plaintiff Robin Zahran, plaintiff Karen Zahran to consolidate cases 95-C-334 and 95-C-1281 (bet) [Entry date 03/12/96]
3/11/96	48	CERTIFICATE OF SERVICE by plaintiff Robin Zahran, plaintiff Karen Zahran (bet) [Entry date 03/12/96]
3/29/96	49	BRIEF by defendant Gerald G. Schmidt Jr, defendant Robert C. Burrell, defendant Marian R. Kmiec, defendant Christopher A. McConville, defendant ABC Ins. Co., defendant Schmidt & Darling, defendant Borgelt Powell Peter

		in opposition to motion to consolidate cases 95-C-334 and 95-C-1281 [47-1] (eeb)
4/1/96	50	BRIEF by defendant Robert C Burrell, defendant Borgelt Powell Peter in opposition to motion to consolidate cases 95-C-334 and 95-C-1281 [47-1] (eeb)
4/1/96	51	BRIEF by defendant Gerald G Schmidt Jr. defendant Schmidt & Darling in opposition to motion to consolidate cases 95-C-33 and 95-C-1281 [47-1] (eeb)
4/2/96	52	BRIEF by defendant Marion R Kmiec in opposition to motion to consolidate cases 95-C-334 and 95-C-1281 [47-1] (eeb) [Entry date 04/03/96]
5/28/96	60	HEARING MINUTES: ; discovery ddl set for 12/1/96; motion filing ddl set for 12/15/96; jury trial set for 9:30 a.m. on 1/13/97; plaintiff shall disclose expert witnesses by 7/1/96; defendants shall disclose expert witnesses by 10/1/96; plaintiff shall have until 6.6.96 to file letter indicating intent to withdraw count 6 of 1st amended complaint as well as their motion to consolidate; plaintiffs shall have until 6/11/96 to file the following motions: (1) for leave to personally serve def. McConville within 30 days; (2) for leave to file 2nd amended complaint; defendants shall

		have until 6/21/96 to file a response to plaintiffs motions; plaintiff shall have until 6/29/96 to file a reply, if they choose to do so. (eeb) [Entry date 05/30/96]
5/9/97	234	NOTICE OF MOTION & MOTION by plaintiff Karen Zahran by Atty John Bickley, Jr. FOR ORDER TO ADOPT ON BEHALF OF KAREN ZAHRAN COUTS 1 THROUGH COURT V OF THE THIRD AMENDED COMPLAINT DATED 2/4/97 & TO ADOPT THE RESPONSE TO MOTION FOR SUMMARY JUDGMENT & ALL OTHER DOCUMENTS & PLEADINGS EXECUTED BY ASSOCIATE EFIC M. SDRENKA (ers)
5/19/97	236	THIRD AMENDED COMPLAINT by Plaintiff Karen Zahran, Jury Demand (ers)
5/22/97	241	MOTION by plaintiff Karen Zahran FOR TRIAL BY JURY (kmf)
5/22/97	242	AFFIDAVIT of John Bickley, Jr. re {241-1} (kmf)
5/22/97	243	NOTICE OF MOTION & MOTION by defendant Robert C. Burrell, defendant Borgelt Powell Peter, third-party

		defendant Reliance Ins. Co FOR SUMMARY JUGMENT (kmf)
5/22/97	244	BRIEF by defendant Robert C Burrell, defendant Borgelt Powell Peter, third-party defendant Reliance Ins. Co IN SUPPORT of motion FOR SUMMARY JUDGMENT {243-1} (kmf)
5/23/97	250	AFFIDAVIT of Christine Nelson w/ attachments (ers)
5/23/97	251	ORDER by Judge Charles N. Clevert DENYING motion FOR EXTENSION OF THE 5/2/97 DISCOVERY CUT-OFF DATE, CONTINUATION OF 6/2/97 TRIAL DATE & EXTENSION OF TIME FOR FILING EXPERT WITNESS REPORTS TO REBUT OR OTHERWISE CONTRADICT DEFTS EXPERT WITNESS REPORT REGARDING DAMAGES {219-1}, DENYING W/O MERIT motion TO STRIKE DEFTS KMIEC, KMIEC LAW OFFICES & WIS. LAYERS MUTUAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT & RELATED PLEADINGS {193-1}, GRANTING motion for order regarding plaintiffs expert on damages. {184-1}, GRANTING motion for extension of time for filing experts reports {182-1}, DENYING AS MOOT motion to strike {160-1}, GRANTING motion for order

		to nonsuit count VI of Karen Zahran's amended complaint. {159-1}, DENYING motion to dismiss plaintiffs amended complaint. {193-1}, GRANTING motion to dismiss {138-1}, GRANTING motion to strike VI {138-2} DENYING motion to dismiss {137-1}, DENYING motion to strike plaintiffs amended complaint. {137-2} The matter is schedued for trial to the Court 6/30/97 at a time to be scheduled by the Court. (cc: all counsel) (ers) {Entry date 05/27/97}
5/30/97	264	ORDER by Judge Charles N. Clevert GRANTING motion TO STRIKE KAREN ZAHRAN'S THIRD AMENDED COMPLAINT & JURY DEMAND. {258-1} GRANTING motion TO STRIKE {248-1} GRANTING IN PART & DENYING IN PART motion TO DISMISS KAREN ZAHRAN'S THIRD AMENDED COMPLAINT OR, IN ALTERNATIVE, RESPONSE TO KAREN ZAHRAN'S MOTION TO FILE THIRD AMENDED COMPLAINT FOR SANCTIONS {248-1}, DENYING motion FOR TRIAL BY JURY {241-1}, GRANTING motion TO STRIKE THIRD AMENDED COMPLAINT OF KAREN ZAHRAN & JURY TRIAL DEMAND OF KAREN ZAHRAN {245-1} The Third Amended Complaint of Karen Zahran attached to

		the Affidavit of John Bickley, Jr. is STRICKEN (cc. all counsel) (ers) {entry date 06/03/97}
6/20/97	284	SUPPLEMENTAL RESPONSE by defendant Marian R Kmiec to Robin Zahran's Request for Production of Documents (ers)
6/26/97	300	SECOND SUPPLEMENTAL RESPONSE to Robin Zarhan's Reguest for Production of Documents by defendant Marian R Kmiec w/ attachments (ers)
6/26/97	301	BRIEF by plaintiff KAREN ZAHRAN IN OPPOSITION to Kmiec, Kmiec Law Offices & Wisconsin Lawyers Mutual Insurance Co's motion FOR ORDER RE: MODE & METHOD OF TRIAL PRESENTATION {270-1} (ers)
6/26/97	302	BRIEF by plaintiff ROBIN ZAHRAN IN OPPOSITION to Deft Kmiec, Kmiec Law Office & Wisconsin Lawyers Mutual Insurance Co.,'s motion FOR ORDER RE: MODE & METHOD OF TRIAL PRESENTATION {270-1} (ers)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN and KAREN ZAHRAN,	)
Plaintiffs,	)
v.	)No. 90 C 0337
FRANKENMUTH MUTUAL INSURANCE COMPANY,	)Judge:)Thomas J.Curran
Defendants.	)

DEFENDANT'S FIRST AMENDED ANSWER AND AFFIRMATIVE DEFESNES

NOW COMES, the Defendant, FRANKENMUTH MUTUTAL INSURANCE COMPANY (hereinafter "FRANKENMUTH"), by its attorneys, JAMES M. HOEY, MARGARET M. HUPP and CLAUSEN MILLER GORMAN CAFFREY & WITOUS, P.C., and for its First Amended Answer and Affirmative Defenses to Plaintiff's Complaint states as follows:

JURISTICTION AND VENUE

1. The jurisdiction of this Court is based upon the diverse citizenship of the parties (28 U.S.C. § 1332). The Plaintiffs are citizens of the State of Illinois and the Defendant is a corporation incorporated under the laws of the State of Michigan, with its principal place of business in the State of

Michigan. The matter in controversy exceeds the sum of $50,000, exclusive of interest and costs.

ANSWER: Defendant admits the allegations of Paragraph 1.

2. The Plaintiffs reside in the Northern District of Illinois, United States District Court.

ANSWER: Defendant admits the allegations of Paragraph 2.

GENERAL ALLEGATIONS

3. On or about august 5, 1988, in consideration of premiums paid to it by the Plaintiffs, the Defendant, an insurance company, made, executed the delivered to the Plaintiffs at Denmark, Wisconsin, a policy of insurance, No. FR 0423155. The policy, which was effective as of July 19, 1988, insured certain farm buildings and other property owned by the Plaintiffs. A copy of the policy with declarations is attached hereto as Exhibit A and made a part hereof.

ANSWER: Defendant admits that it issued a farm owners policy to ROBIN or KAREN ZAHRAN with Policy No. FR 0423155 effective from 7/19/88 to 7/19/89, and Defendant states that said policy was issued and in force only subject to all of its terms, conditions, limitations and exclusions, and not otherwise. Defendant denies the remaining allegations of Paragraph 3.

4. On or about May 24, 1989, while the policy was in full force and effect, a tornado and high winds damaged and destroyed certain of the Plaintiff's property insured by the policy, as follows:

a. Farm personal property (Unit 102), insured for an amount up to $380,000, was damaged in excess of $133,000.

b. A two-story barn (Unit 151), insured for an amount up to $75,000, was damaged in excess of $75,000.

c. Barn #2 (Unit 152), insured for an amount up to $100,000, was damaged in excess of $100,000.

d. Barn #3 (Unit 153), insured for an amount up to $100,000 was damaged to the extent of $65,000.

e. A milk house and bulk tank (Unit 154), insured for an amount up to $25,000, were damaged in excess of $25,000.

f. Silo #1 (Unit 156), insured for an amount up to $20,000, was damaged to the extent of $5,351.66.

g. Silo #2 (Unit 157), insured for an amount up to $20,000 was damaged to the extent of $5,351.66.

h. Silo #3 (Unit 158), insured for an amount up to $25,000, was damaged to the extent of $5,351.66.

i. A slurry store (Unit 160), insured for an amount up to $40,000, was damaged in excess of $40,000.

ANSWER: Defendant admits that on or about May 24, 1989, while the policy was in full force and effect, a windstorm damaged certain and limited of Plaintiff's property insured by the policy. Defendant states that it has paid Plaintiffs for certain property damaged in the windstorm. Defendant is not liable to Plaintiffs for any further sums.

a. Defendant admits that Unit 102 blanket farm personal property contains a limit of $380,000 under the policy, but Defendant denies that farm personal property (Unit 102) was damaged

in excess of $133,000 as a result of the windstorm loss. Defendant has paid Plaintiffs the sum of $26,609.99 which sum represents Plaintiff's total personal property loss.

b. Defendant admits that a two-story barn (Unit 151) was insured under the policy with a limit of $75,000 as a result of the windstorm loss, but Defendant denies that Unit 151 was damaged in excess of $75,000 and Defendant states that it has paid Plaintiffs the sum of $22,223.40 in full payment of damage to Unit 151.

c. Defendant admits that Barn #2 (Unit 152) was insured under the policy with a limit of $100,000 as a result of the windstorm loss, but Defendant denies that said Unit 152 was damaged in excess of $100,000 and Defendant states that is has paid Plaintiffs the sum of $4,000 in full payment of any alleged damages to Unit 152.

d. Defendant admits that Barn #3 (Unit 153) was insured under the policy with a limit of $100,000, and Defendant states that it has paid Plaintiffs the sum of $100,000 for damage to this barn, which represents the limit of liability for this barn under the policy.

e. Defendant admits that a milk house and bulk tank (Unit 154) was insured under the policy with a limit of $25,000, but Defendant states that said milk house and bulk tank were not damaged as a result of the windstorm on May 24, 1989, and Defendant denies that said Unit 154 was damaged in excess of $25,000.

f. Defendant admits that Silo #1 (Unit 156) was insured under the policy with a limit of $20,000, and Defendant admits that Silo #1 was damaged

to the extent of $5,351.66, but Defendant states that it has paid Plaintiffs this sum for damage to this silo.

g. Defendant admits that Silo #2 (Unit 157) was insured under the policy with a limit of $20,000, but Defendant states that it has paid Plaintiffs the sum of $5,351.66 for damage to this silo.

h. Defendant admits that Silo #3 (Unit 158) was insured under the policy with a limit of $25,000, but Defendant states that it paid Plaintiffs the sum of $5,351.66 for damage to this silo.

i. Defendant admits that a slurry store (Unit 160) was insured under the policy with a limit of $40,000. Defendant states that it has paid Plaintiffs the sum of $14,000 for alleged damage to the slurry store, and Defendant denies that said Unit 160 was damaged in excess of $40,000.

COUNT I
ALLEGED BREACH OF CONTRTACT

5. The Plaintiffs reallege Paragraphs 1 through 4 above as Paragraphs 1 through 4 of Count I.

ANSWER: The Defendant realleges its answers to Paragraphs 1 through 4 above as its answer to Paragraphs 5 of count I.

6. On or about May 26, 1989, the Plaintiffs notified the Defendant of the loss and submitted a proof of loss to the Defendant on July 25, 1989, with subsequent amendments.

ANSWER: Defendant admits the allegations of Paragraph 6.

7. The Plaintiffs demanded payment of the amounts due on the policy, but the Defendant has failed and refused to pay said amounts, except the sum of $181,912.74, leaving a

balance in excess of $272,142.24 due to the Plaintiffs under the policy.

ANSWER: Defendant states that it has paid Plaintiffs the sum of $182,888.37. Defendant states that it is not liable to Plaintiffs for any further sum or sums whatsoever, and Defendant denies the remaining allegations of Paragraph 7.

8. The Plaintiffs have performed all conditions precedent of the policy on their part to be performed.

ANSWER: Defendant denies the allegations of Paragraph 8.

9. The Defendant breached the conditions of the policy in that it failed and refused to pay fully the Plaintiff's claims, despite repeated demands by the Plaintiffs to do so.

ANSWER: Defendant admits that it has refused to pay the total amounts claimed by the Plaintiffs, but Defendant denies that it breached the conditions of the policy, and Defendant denies that it is indebted to Plaintiffs in any further sum or sums whatsoever.

10. Because of the Defendant's breach of contract and its failure to pay the Plaintiff's claims, the Plaintiffs have suffered consequential and proximate damages in excess of $265,000 described in part as follows:

a. Certain equipment and fixtures owned by the Plaintiffs were left open to water and weather damage as a result of the Plaintiff's inability to cover or replace their two-story barn, causing the equipment and fixtures to be corroded and damaged in excess of $55,000 for repair and replacement.

b. The Plaintiffs lost space and facilities for more than 80 cows, resulting in annual lost milking profits in excess of $210,000.

c. Plaintiff ROBIN ZAHRAN lost time and profits from his insurance business in attempting to persuade the Defendant to settle the Plaintiff's claims fairly and promptly.

ANSWER: Defendant denies each and every allegation of Paragraph 10, including subparagraphs 10a through 10c, inclusive. Defendant states that Plaintiffs may not recover alleged consequential damages for alleged breach of contract as a matter of law.

11. There is now due and owing to the Plaintiffs from the Defendant an amount in excess of $272,142.244 due under the policy plus an amount in excess of $265,000 due as consequential and proximate damages for a total amount in excess of $537,000, plus interest, attorneys' fees and costs of this action.

ANSWER: Defendant denies each and every allegation of Paragraph 11.

WHEREFORE, Defendant, FRANKENMUTH MUTUAL INSURANCE COMPANY prays that judgment be entered in its favor and against Plaintiffs, and that it be awarded its costs and attorneys' fees sustained herein.

COUNT II
ALLEGED BREACH OF GOOD FAITH

12. The Plaintiffs reallege Paragraphs 1 through 11 above as Paragraph 1 through 11 of Count II.

ANSWER: Defendant realleges its answers to Paragraphs 1 through 11 above as its answer to Paragraphs 12 of Count II.

13. In acting as an insurance company, the Defendant impliedly represented that it would act fairly and promptly for its insured.

ANSWER: Defendant admits the allegations of Paragraph 13 and further states that it did, in fact, act fairly and promptly for its insured.

14. The Defendant has in implied-in-law duty of good faith and fair dealing toward its insured.

ANSWER: Defendant admits the allegations of Paragraph 14 and further states that it did act with good faith and fair dealing toward its insured.

15. The Defendant breached the policy's implied conditions of good faith and engaged in improper claims practices, despite repeated demands by the Plaintiffs, as follows:

a. The Defendant failed to pay the Plaintiff's claims fairly and promptly.

b. The Defendant withheld payments due to the Plaintiffs on their claims.

c. The Defendant delayed making payments to the Plaintiffs on their claims.

d. The Defendant failed to make adequate investigation of the Plaintiffs claims.

e. The Defendant failed to make adequate investigation of the Plaintiffs' claims.

f. The Defendant fraudulently attempted to dispose of the Plaintiffs' claims by submitting to them a check in the amount of $14,000 stating "in total satisfaction of all claims."

g. The Defendant demonstrated racial and cultural bias toward the Plaintiffs in connection with its failure to pay the Plaintiffs' claims.

ANSWER: Defendant denies each and every allegation of Paragraph 15, including subparagraphs 15a through 15g, inclusive.

16. The Defendant intentionally denied the Plaintiffs' claims without a reasonable basis.

ANSWER: Defendant denies the allegations of Paragraph 16.

17. The Defendant failed to pay the Plaintiffs' claims wilfully and wantonly. Punitive damages are therefore justified in this case.

ANSWER: Defendant denies the allegations of Paragraph 17, and further states that Plaintiffs may not recover punitive damages as a matter of law.

18. As a direct and proximate result of the Defendant's breach of good faith, the Plaintiffs have been damaged in excess of $537,000, plus interest, attorneys' fees and costs of this action.

ANSWER: Defendant denies that it breached any duty of good faith, and Defendant denies each and every remaining allegation of Paragraph 18.

WHEREFORE, Defendant FRANKENMUTH MUTUTAL INSURANCE COMPANY prays that judgment be entered in its favor and against Plaintiffs, and that it be awarded its costs and attorneys' fees sustained herein.

COUNT III
ALLEGED BREACH OF STATUTE

19. The Plaintiffs reallege Paragraphs 1 through 18 above as Paragraphs 1 through 18 of Count III.

ANSWER: Defendant realleges its answers to Paragraphs 1 through 18 above as its answer to Paragraphs 19 of Count III.

20. The Defendant's actions, delay and refusal to pay the amount of the loss payable under the policy are vexatious and unreasonable under the provisions of Illinois Revised Statutes Chapter 73, Paragraph 767, thereby rendering the Defendant liable to the Plaintiffs under that paragraph.

ANSWER: Defendant admits the existence of Illinois Revised Statute 73, Paragraph 767, but denies that said statute applies to the present case, and further denies Defendant in any way violated that statute. Defendant denies the remaining allegations of Paragraph 20.

21. There is now due and owing to the Plaintiffs from the Defendant an amount in excess of $537,000, plus interest, attorneys' fees and costs of this action.

ANSWER: Defendant denies the allegations of Paragraph 21.

WHEREFORE, Defendant FRANKENMUTH MUTUAL INSURANCE COMPANY prays that judgment be entered in its favor and against Plaintiffs, and that Plaintiffs' claim for interest, attorneys' fees, costs or any other monetary awards be denied, and that Defendant be awarded its costs and attorneys' fees sustained herein.

FIRST AFFIRMATIVE DEFENSE

For its First Affirmative Defense, FRANKENMUTH states:

1. The policy sued upon Plaintiffs in part states as follows:

> NEGLECT -- We do not pay for loss which results from the neglect of an insured to use all reasonable means to save and preserve covered property at and after the time of loss.

2. Plaintiffs' claim for certain equipment and fixtures which were left open to water and weather damage which Plaintiffs allege caused the equipment and fixtures to be corroded is not covered by reason of the Neglect Provision of the Policy.

SECOND AFFIRMATIVE DEFENSE

For its Second Affirmative Defense FRANKENMUTH states:

3. The policy with respect to "What you must do in case of loss" states as follows:

The insured must also:

(1) Take all reasonable steps to protect covered property at and after an insured loss to avoid further damage; . . .

4. Plaintiffs' claim for certain equipment and fixtures which were left open to water and weather damage causing the equipment and fixtures to be corroded and damaged is not covered by the policy by reason of the policy provision mentioned above.

THIRD AFFIRMATIVE DEFENSE

For its Third Affirmative Defense, FRANKENMUTH states:

5. The policy sued upon further provides as follows:

MISREPRESENTATION, CONCEALMENT OR FRAUD--This entire policy is void if, whether before or after a loss;

a. an insured has willfully concealed or misrepresented:
   (1) any material fact or circumstances concerning this insurance; or
   (2) an insured's interest herein.
b. there has been fraud or false swearing by an insured regarding any matter relating to this insurance or the subject thereof.

No misrepresentation or breach of affirmative warranty affects our obligations under the policy unless:

1. We rely on it and it is material or its is made with intent to deceive; or

2. The fact misrepresented or it is made with intent to deceive; or

6. The Plaintiffs executed and submitted to Defendant a Sworn Statement in Proof of Loss on or about July 25, 1989. In said Sworn Statement and Proof of Loss Plaintiffs stated that at the time of the loss the interest of the insured in the property was solely his, and no other person or persons had any interest therein or encumbrance thereon. Plaintiffs made claim for certain property in the amount of $240,300.37

7. Plaintiffs then submitted a document to Defendant dated September 8, 1989, wherein in addition to the Proof of Loss they made claim for an additional $180,564.67.

8. Plaintiffs submitted a document to Defendant dated September 22, 1989, wherein they made claim for an alleged outstanding balance still due of $314,492.00.

9. Based on the foregoing, the Plaintiffs willfully concealed or misrepresented material facts or circumstances concerning this insurance or the insured's interest herein with intent to deceive, Defendant relied on the misrepresentations and the willfully concealed material facts, and there was fraud and false swearing by the insured regarding a matter relating to the insurance or the subject thereof. Accordingly, Defendant is not indebted to Plaintiffs in any sum or sums whatsoever.

FOURTH AFFIRMATIVE DEFENSE

For its Fourth Affirmative Defense, FRANKENMUTH states as follows:

10. On July 8, 1990, a fire occurred at Plaintiffs' premises which caused damage to Plaintiffs' buildings.

11. Plaintiffs executed and submitted to Defendant a Sworn Statement in Proof of Loss on or abut August 28, 1990.

In said Sworn Statement and Proof of Loss, Plaintiffs claimed an amount in excess of $116,802.50 for the fire damage. As to Barn 151, Plaintiffs made claim for the limit of $75,000.

12. After investigating and adjusting the fire loss, Defendant forwarded a settlement draft to the Plaintiffs in the amount of $99,995 for full payment of the fire damage. Said payment included $75,000 for the limit of coverage for Barn 151.

13. In correspondence dated November 1, 1990, Defendant advised the Plaintiffs of the breakdown of payments made and indicated the limit of coverage for Barn 151 in the amount of $75,000 was paid in full at that time.

14. In this case, prior to the fire loss of July 8, 1990, Plaintiffs claimed Barn 151 was a total loss. Yet, after the fire loss, Plaintiffs made claim for the full limit of liability of Barn 151. Plaintiffs are estopped in this case from claiming that Barn 151 was a total loss following the windstorm.

15. Any damages that may be awarded against FRANKENMUTH (which Defendant denies) must be reduced or diminished by the subsequent payments for the fire loss.

WHEREFORE, Defendant, FRANKENMUTH MUTUAL INSURNACE COMPANY prays that judgment be entered in its favor and against Plaintiffs, and that it be awarded its costs and attorneys' fees sustained herein.

COUNTERCLAIM

1. Pursuant to the demands of Plaintiffs, Defendant has paid Plaintiffs the sum of $182,888.37 for alleged damage to property as a result of the windstorm of May 24, 1989.

2. The Plaintiffs executed and submitted to Defendant a Sworn Statement in Proof of Loss on or about July 25, 1989. In said Sworn Statement in Proof of Loss Plaintiffs stated that at the time of the loss the interest of the insured and

the property was solely his, and no other person or persons had any interest therein or encumbrance thereon. In said Sworn Statement in Proof of Loss Plaintiffs made claim for certain property in the amount of $240,300.37.

3. Plaintiffs then submitted a document to Defendant dated September 8, 19089, wherein in addition to the Proof of Loss they make claim for an additional $180,564.67.

4. Plaintiffs submitted a document to Defendant dated September 27, 1989, wherein they made claim for an alleged outstanding balance still due of $314,492.00.

5. Plaintiffs have made claim for a ventilation system under the Personal Property Coverage of the policy, even though said property was a fixture and a part of the buildings, and said claim was made with an intent to deceive the Defendant.

6. Plaintiffs have made claim for a two-story barn (Unit 151) for an amount in excess of the policy limit of $75,000, with the intent to deceive the Defendant even though said barn is not a total loss.

7. Plaintiffs have made claim for Barn #2 (Unit 152) for alleged damage in excess of the policy limit of $100,000, with intent to deceive the Defendant even though said barn is not a total loss.

8. Plaintiffs have made claim for a milk house and bulk tank and Plaintiffs claim that said loss is in excess of the policy limit of $25,000, when in fact said milk house and bulk tank were not damaged and are not a total loss, and said claim was made with the intent to deceive Defendant.

9. Plaintiffs have made claim for a slurry store (Unit 160) for an amount in excess of the policy limit of $40,000 when said slurry store was not a total loss. Said claim was relied upon by Defendant and was made with intent to deceive the Defendant.

10. The policy issued by the Defendant to Plaintiffs referred to in Plaintiffs' Complaint states as follows:

MISREPRESENTATION,CONCEALMENT OR FRAUD--This entire policy is void if, whether before or after a loss;

a. an insured has willfully concealed or misrepresented:
   (1) any material fact or circumstances concerning this insurance; or
   (2) an insured's interest herein.

b. there has been fraud or false swearing by an insured regarding any matter relating to this insurance or the subject thereof.

No misrepresentation or breach of affirmative warranty affects our obligations under the policy unless:

11. Plaintiffs willfully concealed or misrepresented material facts or circumstances concerning this insurance or the insured's interest herein with intent to deceive, Defendant relied on the misrepresentations and willfully concealed material facts, and there was fraud and false swearing by the insured regarding a matter relating to the insurance or the subject thereof.

12. Based on Plaintiffs' misrepresentation, concealment or fraud, the policy is void and Plaintiffs are liable to Defendant for the sums previously paid to Plaintiffs by Defendant.

WHREFORE, FRANKENMUTH MUTUTAL INSURANCE COPNAY prays that judgment be entered in its favor and against Plaintiffs in the sum of $182,888.37, plus interest, costs and attorneys' fees.

DEFENDANT AND COUNTER-PLAINTIFF DEMAND TRIAL BY JURY

James M. Hoey

_____

JAMES M. HOEY

JAMES M. HOEY
MARGRGE M. HUPP
CLAUSEN MILLER GORMAN
CAFFREY & WITOUS, P.C.
10 South La Salle Street
Chicago, Illinois 60603-1098
312/855-1010

Attorneys for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN and
KAREN ZAHRAN,
Plaintiffs, Case No. 90-C-337

v.

FRANKENMUTH MUTUAL
INSURANCE COMPANY,
Defendant.

SPECIAL VERDICT

We the Jury in the above -entitled case, having been duly impaneled and sworn to try the issues, find four our special verdict as follows:

QUESTION NO. 1:

Did the Zahrans violate the policy provision relating to misrepresentation, concealment or fraud by willfully concealing any material fact or circumstance concerning their insurance claim?

Yes XXX No. _____

If the answer to the preceding question was "yes," you need not answer any of the following questions. If the answer was "no," please answer the following question.

QUESTION NO. 2:

Are the plaintiffs, Robin and Karen Zahran, entitled to monies under the insurance policy as a result of the May 24, 1989 windstorm regarding the damage to their farm and/or personal property?

Yes _____ No. _____

QUESTION NO. 3:

If you answered Question No. 2 "yes," then answer this question:

What sum of money will reasonably compensate the plaintiffs, Robin and Karen Zahran, for damage to:

a. Barn (Unit 151) $_____

b. Milk barn (Unit 152) $_____

c. Grainery and milk house (Unit 154) $_____

d. Slurry tank (Unit 160) $_____

e. Farm Personal Property $_____

QUESTION NO. 4:

Did the defendant, Frankenmuth Mutual Insurance Company, at any time, act in bad faith in the handling of Robin and Karen Zahrans' claims resulting from the damage to their farm and/or personal property due to the May 24, 1989 windstorm?

Yes _____ No _____

QUESTION NO. 5:

If you have answered Question No. 4 "Yes," then answer this question.

What sum of money will reasonably compensate Karen and Robin Zahran for:

a. Farm business losses due to delay $_____

b. Losses form plaintiffs' insurance business $_____

QUESTION NO. 6:

What sum of money, if any, should be assessed against the defendant, Frankenmuth Mutual Insurance Company, under the circumstances of this case, as punishment in order to deter the defendant and others from offending in a like manner in the future?

$ _____

We, the jury unanimously find the facts to be as indicated in our answers to the foregoing questions.

Dated this 26 day of December, 1991.

Foreperson	Juror
Juror	Juror
Juror	Juror
Juror	

DEFENDANT'S PROPOSED INSUTRUCTION NO. 37

DEFENDANT'S PROPOSED SPECIAL VERDICT FORM

1. Did the ZAHRANS violate the policy provision relating to misrepresentation, concealment or fraud?

ANSWER: _____
yes or no

If the answer to the preceding question was yes, you need not answer any of the following questions. If the answer was no, please answer the following question.

2. Are the Plaintiffs entitled to recover against FRANKENMUTH on their breach of contract claim?

ANSWER: _____
yes or no

If the answer to the proceeding question was no, you need not answer any of the following questions. If the answer was yes, please answer the following questions.

3. What was the amount of the ZAHRAN's loss covered under the insurance policy as a result of the windstorm of May 24, 1989.

1.	Barn (Unit 12)	$_____
2.	Milk house and bulk tank (Unit 154)	$_____
3.	Slurry tank (Unit 160)	$_____
4.	Farm personal property	$_____
5.	Debris removal	$_____
	TOTAL	$_____

4. Did FRANKENMUTH exercise bad faith in denying the claim of the ZAHRANS?

ANSWER: _____
yes or no

Unit 151 (Main Barn)
Coverage: $75,000.00
Damage: over $75,000.00 (Ex. 30-Zellner)
Amount Paid: $8,500.44 (Ex. 2, p.27)
$6,274,00 (Ex. 2, p. 68)
Amount Unpaid: $60,225.56

Unit 152 (Warming Barn)
Coverage: $100,000.00
Damage: over $139,068.94 (Ex. 2, p.15)
Amount Paid: $4,000.00
Amount Unpaid 96,000.00

Unit 153 (Blown Away)
Coverage: $100,000.00
Damage: over $100,000.00
Amount Paid: $75,000.00
$25,000.00
Amount Unpaid: -0-

Unit 154 (Grain Barn & Milk Tank)
Coverage: $25,000.00
Damage: $25,500.00 (Ex. 30-Zellner)
Amount Paid: -0-
Amount Unpaid: $25,000.00

Unit 156 (Silo)
Coverage: $20,000.00
Damage:
Amount Paid: $5,351.66
Amount Unpaid:

Unit 157 (Silo)
Coverage: $20,000.00

Damage:
Amount Paid: $5,531.66
Amount Unpaid:

Unit 158 (Silo)
Coverage: $25,000.00
Damage:
Amount Paid: $5,531.66
Amount Unpaid:

Unit 159 (Silo)
Coverage: $10,000.00
Damage: Not damaged
Amount Paid:
Amount Unpaid:

Unit 155 (Machine Shed)
Coverage: $16,000.00
Damage: Not damaged seriously
Amount Paid:
Amount Unpaid:

Unit 160 (Slurry Tank)
Coverage: $40,000.00 + Farm Personal Prop. coverage
Damage: $79,070.00 (Ex.33-Wildenberg)
Amount Paid: $14,000.00
Amount Unpaid: $65,.070.00

Unit 102 (Farm Personal Prop.)
Coverage: $380,000.00
Damage:
Amount Paid: $26,609.00 + $6,473.22 for Fan in 151
Amount Unpaid:

Advances to plaintiff: $25,000.00 (Used by Frankenmuth for Barn 153 and is included in Amount Paid column of Unit 153 above.

SUMMARY

Total Unpaid: $506,086.51

$ 60,225.56	-	Unit 151
$ 96,000.00	-	Unit 152
$ 25,000.00	-	Unit 154
$ 65,070.00	-	Unit 160
$183,370.00	-	Milk Losses
$ 76,420.95	-	Unit 102 Farm Personal Property including:
$ 6,364.02	-	5 Cows @ $1,600 minus the monies received by vet.
$ 3,699.00	-	Silo Elevator
$ 10,000.00	-	2 Fans
$ 4,200.00	-	2 Running Gears
$ 209.00	-	Diesel Tank
$ 2,178.00	-	Gutters
$ 797.55	-	1 day of lost milk (6,500 lbs @ $12.27 per 100 lbs)
$ 398.00	-	Silo pipe and door
$ 4,628.38	-	Braun Electric
$ 32,473.95	-	Total Farm Personal Property Damage Not Paid For by Frankenmuth
$ 40,947.00	-	Property damage either covered by policy or caused by Frankenmuth's delay.

$	3,000.00 -	2,000 bails of straw @ $1.50 per bail
$	76,420.95	-Total

Total Unpaid as above:	$506,086.51
Interest on Unpaid at 12% (12-1-89 to present):	$128,748.81
Total Losses:	$634,834.92

12/17/91 JURY TRIAL - OPENING STATEMENT: DEFENDANT

PROCEEDINGS

THE CLERK: Robin and Karen Zahran, plaintiff, versus Frankenmuth Mutual Insurnace Company, defendat, Case Number 90-C-337. This is a jury trail. May we have the appearnaces, please.

MR. KMIEC: Marjan R. Kmiec and Christopher McConville for the plaintiffs, Robin and Karen Zahran, who are also present.

THE COURT: Good morning.

MR. HOEY: Good morning, Your Honor, James Hoey and Peter Kanaris for Frankenmuth.

THE COURT: Good morning. And good morning, members of the jury.

Are you ready to proceed, Mr. Hoey?

MR. HOEY: I am, Your Honor.

OPENING STATEMENT

MR. HOEY: May it please the court.

THE COURT: Counsel

MR. HOEY: Ladies and gentlemen of the jury, Mr. and Mrs. Zahran, Counsel.

As you know, my name is Jim Hoey. Peter Kanaris and I represent Frankenmuth Insurance Company. Yesterday you heard plaintiffs' opening statement. I am confident that you will keep an open mind until you hear all of the evidence and until you hear both

VOLUME II - PAGE 94

PAGE 95 MISSING

misrepresented, one, any material fact or circumstance concerning this insurance; or, tow, an insured's interest herein; B, there has been fraud or false swearing by an insured regarding any matter relating to this insurance or the subject thereof. Under condition 6, misrepresentation, concealment or fraud, the following is added. " No misrepresentation or breach of affirmative warranty affects our obligations under the policy unless, one, we rely on it and it is material, or it is made with intent to deceive."

Now, first let me see if I can set out for you once again the layout of the premises. And this is a diagram, Defendant's Exhibit Number 44. And I'll use this ledge here and I think I'll leave this here. And this is a site plan. It's not to scale. And we're going to say this is the north direction. We have here on the north side building 153. Here we have building 151. This is the milk house building, 154. 153 was a metal building. 151 was a two-story wooden frame old barn, old, old barn. 152 was a long, one-story barn. And the slurry tank was over here and that's where the manure was kept.

Now, in applying for the insurance, Mr. Zahran met with a person in Green Bay called a producer. His name is Louis Rush with the Kranzusch Insurance Agency. So when you buy insurance you sit down and an application is filled out and you sign it. Pictures were taken of the farm when the policy was applied for. And I have a couple of those pictures to show you so you can see what it looked like before this loss.

I have here Defendant's Exhibit Number 50A, which is a picture looking at the barn, and we're looking west. So if you can picture this. The photographer is standing over here, there's a driveway, and he'd be looking west. And you can see here this milk house here, and inside the milk house there's a big bulk tank and there's- - an office is there. And here we can see the two-story wooden frame barn, 151. Here I have

Defendant's Exhibit 50B. And this is a photo looking from the northwest looking back southeast. And you can see here building 153, the metal building which sort of wraps around building 151. So these two photos were taken before the loss.

Here I have part of the policy it's called the declaration sheet. And it has some detail about what the insurance company agrees to insure. And I hope you can see this. I'll stand a little closer in case the print is small. You see we have a farm owner's policy effective July 19, 1988. You can see the producer, Kranzusch Agency, Inc. That's who Mr. Rush worked for. Here you have Mr. or Mrs. Zahran identified. And here we have certain buildings or farm buildings, out buildings, whatever you want to call them, with the limits and premiums. And here we have 151. type 2 frame. Two-story barn, 40 by 120. Limit : $75,000. And you can see the premium charge is $372. 152. That's the reminder. This long building here. Type 1 masonry barn, number 2, 40 by 170. Limit: $100,000, premium $335. barn number 3. Type one. All metal. 60 by 160. Limit: $100,000, premium $335. I'll just go through two more of these. 154. Type one masonry, milk house and bulk tank, 20 by 26. Limit: $25,000, premium $89.

And let me drop down here to number 160. type one glass, porcelain or enamel, slurry store, 50 by 23. 50 percent construction applies. Limit: $40,000 premium $75.

So this is from the policy.

As I might have mentioned before, Frankenmuth Insurance Company is based in Michigan. They are about 80 miles north of Detroit. They have been in business I'm told long before my time. 150 years. Mr. Spalding, who is sitting at the table with us, is the property claims supervisor, and hopefully he will be with us this week and I understand that he will testify during plaintiff's case.

The loss occurs on May 24, 1989. There's no dispute about the fact that there was a windstorm. After that

occurrence, Frankenmuth has what they call staff adjustors, people that work directly for the insurance company that go out and inspect sites and adjust losses, deal with the insured, perhaps deal with contractors.

This man's name was Bill Conaway. Mr. Conaway has since retired. He retired by the end of July or early August of 1989. I understand that the plaintiff will read his deposition. His deposition was taken at his home in Michigan.

So Bill Conaway sends Mr. Zahran a letter, and the letter is dated May 26, 1989. The loss was on May 24. The letter says: We need a detailed estimate of damage or value and a cost to repair by a competent person or firm and photos.

Now, Mr. Conaway also goes to the site shortly thereafter, visits the site, takes photographs, meets with Mr. Zahran, walks around, inspects the premises. And we have some of his photographs that he took that day.

Now, why did Mr. Conaway ask for those items? As I mentioned before, the policy is a two-way street. Not only does the insurance company have obligations, but the policyholder does too. And here we have a provision from the policy called additional duties, Defendant's Exhibit Number 10. Additional duties, property coverages. The insured must also: one, take all reasonable steps to protect covered property at and after an insured loss to avoid further damage. We pay for repairs which are reasonable and necessary to protect the property from further damage, provided the insured keeps an accurate record of such expenses. These payments do not increase the limit of liability otherwise applicable to the loss.

Two. Submit to us a statement of loss under oath if requested within 60 days after the loss or accident. At our request the insured must also submit a proof of loss containing the following information.

A. Time, place and circumstances of loss.

B. The insured's interest and the interests of others in the property involved, including all mortgages and liens on the covered property.

C. Other policies of insurance that may cover the loss on the property.

D. Change it title or occupancy of the property during the policy period.

E. Available plans and specifications of buildings or structures.

F. Detailed estimates for repair of the damage.

G. An inventory of damaged personal property showing in detail the quantity, description, cost, actual cash value and the amount of loss. the insured must attach to the inventory copies of all bills, receipts and related documents that substantiate the inventory.

And then there's some other provisions relating to examination under oath, production of records, et cetera.

The policy also contains a provision relating to neglect. Defendant's Exhibit Number 9. Neglect. We do not pay for loss which results from the neglect of an insured to use all reasonable means to save and preserve covered property at and after the time of loss.

Now, I mentioned that Mr. Conaway was there after the loss. And I'd like to show you now one of the photos that he took. This is Defendant's Exhibit Number 56. And this is a view of the - - - the photographer is looking this way, looking southeast, I believe. And here you can see the deck where 153 had been. So 153 is gone. And this is the wooden deck here which is still remaining so there's still an area below that. And here you can see the north side of barn 151. And you can see some boards are missing and this is barn 151. Here is a small section of the roof right here. This is taken shortly after the windstorm.

Now, the policy contains a limit of liability for each out building. That's just a limit. Perhaps the loss is not in excess of the limit, does not reach the limit. So, nevertheless, nevertheless, Frankenmuth makes an advance payment - - without receiving any documents from Mr. Zahran, they make an advance payment of $25,000, and the check is dated July 11, 1989.

Then on July 26, Mr. Zahran sends a letter to Frankenmuth - - July 26 - - enclosing bills and estimates of the costs to repair the damages. I'm sure the letter will be in evidence. And with the letter there's a sworn statement in proof of loss. This will be Defendant's Exhibit Number 6. And, the amount of the loss claimed in the proof of loss as of July 25, 1989, signed by Mr. and Mrs. Zahran, is roughly $240,000. $240,000. And with it, there's a work sheet prepared by Mr. Zahran, list of bills for a Corn Hill Farms. And I'm not going to go through all the items on the list with you, but let me just cover some of the big items. Four cows died. $4,400. Things like bales of hay, damages to silos, roof shingles, three barns. Roof shingles, three barns. $3900. Clean -up. There's tow items pertaining to the slurry tank. The top ring of 11, 928, the second ring 11,928.

There's on barn listed, 494,339. Of course, you can see that barn 153, the metal siding has been blown away.

And then there's a listing for other barn. And the amount listed is $12, 282. And then there's a listing for demolishing and bottom, $17,800.

We don't find anything in here on barn 152, the one story barn. Now, the amount for $12,282. We have a proposal from a company called Thiede, T-H-I-E-D-E, Peninsula building Service, in that amount, $12,282. It says, repairs on existing building. Purchase and install 54 square feet of asphalt shingles on existing barn. Repair all broken roof boards and replace gutters and downspouts, approximately 200

feet. Main support beams of existing barn for roof needs to be jacked up and supported. Frame in open end of barn and cover with tin. Build and install two sliding doors on existing barn. Straighten existing wall. Repair any incidental damage found while repairing building.

What does Frankenmuth do? Remember, this came in July 26. Frankenmuth responds with a letter dated August 7, 1989. Mr. Conaway is in the throes of retirement. He gets together with Mr. Spalding, and Frankenmuth responds with a letter. August 7, 1989. Dear Robin or Karen Zahran: This letter is a follow-up to the personal visit and many phone conversations that I have had with Mr. Robin Zahran in regard to the wind loss suffered by barns, silos and farm personal equipment on the date in question. Although I am certainly aware that disputes still remain, I am confident after personally inspecting the damaged insured property and having had a further opportunity to review the various estimates which have been prepared to assist in the determination of the loss of value of the various damaged insured farm property, that I can properly pay and indemnify you for your loss at this time. To this end, I am forwarding to you various drafts made payable to yourself and the various parties at interest totalling $136,687.74. An explanation and breakdown of the payments is as follows: A total of $26,609.99 is closed for damage for various farm personal property including your cows and also including a $2,000 allowance for cleanup. Attached to this letter is a breakdown on your farm personal property damages. And we have a two-page attachment here which shows various line items such as cows, repair grain auger, repair Bobcat with amounts listed, which totals the roughly $26,600.

For your barn which is delineated as barn 153 on your policy, enclosed is a payment for $75,000 which represents the total policy limit of $100,000 on this barn minus the $25,000 advance payment that was made. So they've paid the

limit on 153. And then they talk about three silos that were damaged. Payment was made on those. Three's no dispute with those in this lawsuit. Those payments were each $5,351.66 for each silo.

I am also enclosing $14,973.77 for damages to the barn delineated as Number 151. This includes $6,473.33, allowance for the vent system. A payment for $4,000 is enclosed for barn delineated as Number 152.

As indicated above, these payments total $136,687,74. You will note that there is no proof of loss nor is there any release being required or requested for your negotiation of these drafts. It should be made, however, clear to you that this is my estimation of your total loss and damages in this claim. As a fiduciary for all insureds who entrust their premium money with us, we must observe reasonable standards of proof of damages.

We also make payment to Forest Construction Company. And I have an invoice here, Forest Construction Company, the amount is $975.63. It says, labor to straighten the brace barn, 33 hours. $22 per hour. Materials. 10 two-inch by 8-inch by 20 feet. And then it's all added up to the $975 figure.

So at this point, taking into account the advance payment, Frankenmuth has paid $161,687 roughly.

Another sworn statement in proof of loss comes in from Mr. Zahran, and it's dated September 8, 1989. And this one is in the amount of $180,564.67.

And we have a letter explaining the basis of the amount, the request for additional payment from Mr. Zahran to Mr. Spalding, dated September 8, 1989. And in the letter he says: When we submitted our proof of loss there were several items that you did not pay for, therefore, I am forwarding to you my note in addition to the proof of loss for the items that you did not pay. And in here he makes claim for the slurry

tank. And the amount claimed is $79,070. $79,000. Item 160, slurry store, limit $40,000. For 151 he makes a claim for a total loss to 151. Two-story frame barn. And you know that we've already paid some money for that for repairs. And he claims the balance due on the limit of $75,000.

We then get another letter dated September 22, 1989 from Mr. Zahran to Mr. Spalding, and the number goes up again. Now the number for additional payments are $314,492. And this letter was broken out, and I won't go through each item, but there's a pump listed here for $15,000. The pump was in the slurry store or in the slurry tank. We will show that the pump was not damaged. The manure system again is claimed for $79.070. And now, there's a claim for barn 152. Here's barn 152. The claim there is $88,120.

Now, let me show you Exhibit Number 51. This is a photo taken by Merle Brander on March 7, 1990. This is barn 152 for which the claim is made of $88,120. What does Mr. Spalding do? And I might add, the September 22, 1989 letter says from Mr. Zahran: I am at this time going to instruct my attorney to file action in the federal court for damages caused by the tornado and which you re refusing to pay, and damages that have been caused by your continuous delay.

That's one of the paragraphs in the letter.

Mr. Spalding has an open mind. He's trying to do the best job that he can. He's not closing the door. What does he do? He hires another adjuster. Mr. Conaway is retired. He contacts a gentleman by the name of Larry Mours, M-O-U-R-S. Mr. Mours is an independent insurance adjuster. In other words, he works for a private company that works for a whole group of insurance companies, and he's based there in Green Bay close to Denmark.

He calls Mr. Mours and says look into this some more. He's still claiming damages for 151, for the slurry store. I'd like you to contact some experts in the area, somebody that

knows wooden barns, somebody that know the slurry tank, and have them look at it and we'll take a second look at this darn thing.

So you don't have to e a graduate engineer to be an expert. An expert can be anyone that has experience. If you have spent your life working around wooden barns, you're an expert at it. You don't have to be a graduate engineer.

So, a gentleman by the name of Orville Krueger is contacted by Mr. Mours, and Mr. Krueger calls his business, he calls himself The Barn Doctor. So Mr. Mours and Mr. Krueger go out there and look at this barn 151.

Now, by this time there's been some work to it. And here is Defendant's Exhibit Number 51. This was taken by Mr. Brander in March. But this is looking at barn 151 from the west looking east. And you can see that it's been covered up with tin. You can see that 153 is no longer there. Exhibit 51 again is a view looking east, taken in March 1990. Here we have barn 151. Exhibit 50A, that's what it looked like before the loss.

So, Mr. Krueger goes and looks at it. They visit the site on September 20. Mr. Krueger reported that the two-story barn could be repaired. He did not see any discernible damage to the one-story warming house, barn 152. Mr. Spalding responds to Mr. Zahran again with a letter dated October 18, 1989. In this letter he states: Dear Robin or Karen Zahran, I am enclosing at this time a copy of the report and estimate as submitted by Mr. Orville Krueger pursuant to the damage to both your wood two-story barn, 151, and also as it pertains to damage to the warming barn or number 152.

As you can see in Mr. Krueger's observations, he feels that part of the damage to your barn is not wind related, and refers specifically to the situation where the barn is handing over the side wall and also leaning endways. You can see in his observations the reason he questions this. Further, you can see

where he is estimating that he can repair the wind damage to the wood two-story barn and also do some minor masonry work to the warming barn for a total of $5,264.

The remaining work for what Mr. Krueger feels is not wind damage can be completed possibly for $1,000 if all he has to do is jack one side of the barn and possibly as much as $10,000 if he has to jack the entire end of the barn and anchor it together. Although Mr. Krueger does not feel that the additional $1,000 or additional $10,000 is necessary to correct wind damage, in order to give you the benefit of the doubt I am enclosing with this correspondence a draft in the amount of $6,274 to represent the 5,274 for wind damage to both the wooden two-story barn and the warming barn and also the $1,000 that may be completely correct - - that may completely correct the other problems referred to.

Did Mr. Krueger do the work? No, he did not. Why did not Mr. Krueger do the work? The reason that I didn't fix the barn was that after I had sent the proposal to GAB or Larry Mours, Mr. Zahran called me several times a day, weekends, Sundays, whatever, and harassed me terribly. And he said you're going to fix it for six thousand some dollars and I'm going to hire you to fix the barn and them I'm going to turn around and I'm going to sue you for $600,000 and you're going to put me up a new barn. And in that conversation I said to him, Mr. Zahran, if you go into a filling station and ask for five dollars worth of gas, that doesn't necessarily mean you re gong to get a whole tankful. I will do the work that is proposed in my proposal and put that barn back in shape so that it's usable and straighten out to what you can do with that old barn. You're not going to get a new roof because he pointed out to the peak of the barn where originally these old barns had old shingles and the boards were spaced apart so the wood shingles when they get wet they can get air to dry out. And when he pointed up to the peak of the barn and said I'm going to get this

just like so that's going to fit us just so, and I was not about to tear that roof open and resheet it with all new lumber, and that is what he was asking. So after the harassment from him, I determined that he wasn't worthy of my services and why should I put up with all this harassment. So I called Larry Mours and I asked him to take me off the case and forget about it, and he said it was no problem and after that I did not hear from Zahran.

Mr. Mours had trouble finding someone to look at the slurry tank. The slurry rank was made by a company called Quonset, and was apparently built in 1986. And the company was American Structures, a fellow by the name of Wildenberg.

So, finally, Mr. Mours found a gentleman by the name of Joel Portmann to come and look at the slurry tank. And here's what the slurry tank looked like as of march 7, 1990. Again, this was a photo taken by Merle Brander, Defendant's Exhibit Number 51. See the Quonset name there. It was still in use. And Mr. Brander climbed all over that tank and he climbed up a ladder and he looked inside, and this is what it looked like on the inside. Defendant's Exhibit Number 51. so he's up over looking in and he can see a layer of snow up on the top there.

Mr. Portmann found that the tank had some problems at the top. He wasn't sure of whether or not it was wind related. It could have been an original installation problem. But, again, Frankenmuth gave the policyholder the benefit of the doubt. November 10. 1989, Mr. Spaulding sent a letter to Mr. Zahran. This letter will follow up my telephone conservation with Robin on November 9, 1989. At that time I indicated that I had received a telephone report from Mr. Mours detailing to some extent his understanding of the inspection results of the slurry tank in question as completed by Mr. Joel Portmann. I have not received Mr. Portmann's written appraisal or proposal, but will, of course, forward to you a copy once I

receive it. In the meantime, Mr. Mours has prepared a report on GAB letterhead which reflects to the best of his ability the total results of his personal discussions and conversations with Mr. Portmann. I am enclosing a copy of this report with this correspondence and as you can see, although there is some question as to causation, wind or nonwind, Mr. Portmann has estimated and proposed that he can repair the slurry tank in the amount of $14,000. Accordingly, I an enclosing a draft in the amount of $14,000 made payable to all parties of interest to be used as you see fit, but hopefully to be utilized in the repair of the slurry tank in question. Et cetera.

So, at this point Frankenmuth has made payments of roughly $183,000.

Mr. Portmann was not interested in getting involved in the dispute, was not interested in doing the work, but we believe that his proposal was valid and reasonable and provided a reasonable basis of which Frankenmuth could make payment. We don't believe that the tank was a total loss.

The lawsuit in this case was then filed on January 19, 1990 in federal court in Chicago. That's where I'm from.

After the suit was filed I made contact with merle Brander who is a structural engineer based in Green Bay, and he made an inspection of the site on March 7, 1990, climbed all over the barn with one of his assistants by the name of Patrick McCormick, climbed upon the - - well, let me go through some of the photos that he took. I think I've already gone through a number of them. Here's one that he took on March 7, 1990. Here's 152, the warming barn, here's 151. There was a total loss being claimed for 152. He climbed up on the roof of 152 and he's looking north, and you can see the roof of 152 here and you can see 151 right here. 152, the one-story barn, he climbed up in the attic, go through a hatch and climb up there, and he took a picture of the trusses up there. And this is what it looked like. Found no damage up there.

Here's a picture that he took, I think I showed you this earlier looking west, here's 151. And based on what he found he thought Frankenmuth's position was reasonable. In fact, 151 was repairable, it was not a total loss. He found that 152 had no discernible damage. He found that the slurry tank was not a total loss. And Mr. Brander will be here to share with you his findings.

Then in July of 1990, Frankenmuth is still on the risk, they're still insuring Mr. Zahran. July of 1990, there's a fire in 151.

MR. KMIEC: Your Honor, may we approach the bench in respect to this subject matter?

THE COURT: You may, counsel.

(Side bar discussion off the record.)

MR. HOEY: July 1990 there was a fire in 151. A sworn statement in proof of loss was submitted by Mr. and Mrs. Zahran, dated August 28, 1990, the amount claimed was in excess of $116,802.50. Total loss was claimed for barn 151, the limit of liability of the policy was $75,000. Frankenmuth paid to Mr. Zahran roughly $100,000 on November 1, 1990, $75,000 of which included the total limit of liability on barn 151.

In summary, it's Frankenmuth's position they handled the claim reasonably, in good faith. They did not act in bad faith. And that rather, Mr. Zahran did not keep his end of the deal; that the policy is void because he violated the policy provision relating to misrepresentation, concealment and fraud. Thank you very much.

THE COURT: The bailiff will hand out the pads and pencils, please.

(Pause.)

THE COURT: All right, Counsel, you may call your first witness.

MR. KMIEC: We call Robin Zahran to the stand, Your Honor.

THE COURT: All right, Mr. Zahran,

THE CLERK: Would you raise your right hand, please.

ROBIN ZAHRAN,

12/31/91 JURY TRIAL - CLOSING STATEMENT: DEFENDANT

We submit that this is a case about a man that simply went too far and he kept grabbing for more and more and more and more, and he violated his policy prevision. And it's up to you to send that message.

Mr. Zahran said pictures don't lie. That's right. That's why we brought all these pictures for you to look at. That's why Mr. Brander was here with his photographs. We had the Conaway photographs. Because we wanted you to see that these things that he was making clim for were in fact no damaged, that he knew that they were not damaged, and that he contrived with these other people to make claim for them. And as time went on, the claim was just escalating and escalating. so pictures don't lie; unfortunately, sometimes people do.

We brought you the signed application so that you could see for yourself that they slurry was listed as $40,000, yet the claim was $80,000. That 151, the two-story barn, had a limit of $75,000, yet he made claim for more than that.

You also say on the application 150 regular dairy cows, yet they would come here and tell you that they're entitled to lost milking profits for 230 cows which we can se was simply not the case.

We have a situation where we have a

sophisticated insured. We're not dealing with someone like yourself perhaps that's never been involved in a lawsuit or never bas been involved in an insurance claim. Mr. Zahran is an insurance broker, how knows the game, he knows insurance policies. He knows the seriousness of sworn statements in

proof of loss. He knows what it means when he put his name to it. Take it back with you to the jury room and read the print on it. He knew exactly what it meant and how serious it was. And he knew the consequences that if he misrepresented the damage, that it would void his policy.

Mr. Conaway was on the site, we read to you his deposition. You heard that he's no longer in good health and that he did his best to tell you what he did. He was at the site, he made an advance payment for 153 in July. Mr. Zahran submits the sworn statement in proof of loss in late July. And you have the August 7 letter. Frankenmuth in good faith timely responds with money of abut $136,000. They've already paid $25,000. Now, if that isn't a timely response I don't know what is

What did he claim on the slurry tank? He's not claiming the slurry tank is a total loss at that time? He simply calls up Earl Wildenberg and he gets an estimate for roughly $11,000 for one ring and then he doubles it. And he's not making a claim for 152 at that time, there's no mention about 152. And you know that Zeller had already been on the site right after the windstorm loss. Yet nothing about 152.

And Khalidi, when was Khalidi there? Who really knows when Mr. Khalidi was there? Here we have a case where Mr. Khalidi is a social friend of Mr. Zahran, he testified in his deposition under oath that he was there in June 1989, and then he changed it. Then he said December of 1989. What do you believe?

I know when you go somewhere and you think back in your memory banks about that experience, I always associate it with the whether. What was the weather like when I did that particular thing? Don't you think that Mr. Khalidi would have remembered what the weather was like when he went to the farm? I submit to you that he has no credibility and you should not believe anything that he said.

Mr. Spalding I though this morning tried to explain to you how he and Mr. Conaway worked on the claim, did the best they could. They tried to be fair. I thought they tried to give Mr. Zahran the benefit of the doubt. They responded on August 7, and then this thing just kept snowballing as Mr. Zahran grabbed for more. And comes back with the September 8th letter with the sworn statement in proof of loss. Have a look at it. Now he want another $180,645. I asked him, so as of September 8, 1989, according to the proof of loss, it was your intent that Frankenmuth should pay you an additional $180,000. Is that true? Yes, sir.

At that point he has nothing for 152. Zeller's already been there. He's making claim for $79,000 for the slurry. He knows full well that the limit is $40,000. In fact, you might remember Mr. Wildenberg built it, Mr. Wildenberg confirmed that Mr. Zahran paid $40,000 for it, that's where the limit came from.

Then Mr. Zahran talked abut the meeting in Michigan. He claimed it lasted five minutes. That's unbelievable. Wouldn't it be more reasonable that if he's going to drive to Frankenmuth he had a 30 minute meeting? I tried to share with you the notes that Mr. Spalding made at the time of the meeting. Now, that's something credible. That's before this thing is in suit. That's when people make notes and they're going to write down what happened. and I had you read - - - I had him read his notes and you had a chance to read his notes and you'll be taking those back to the jury room. Now here's Mr. Spalding trying to do a good job. He had an open mind. He said, all right, I'll hire an independent adjuster from Green Bay, Larry Mours. Let's get some more people to look at the barn, we'll get somebody to look at the slurry tank.

So Mr. Mours contacts Ovril Krueger. Now, Mr. Krueger comes in here, they say he's court tested; I find that unbelievable. Mr. Krueger said here that he had never been

in court before. did he look like the kind of guy that's been in court before, traveling round Wisconsin testifying? And then he brought to you his proposal. He stood here and explained his photographs. And he said the barn 151 was repairable. the barn was repairable. And I could do it, I was willing to do it. And then what happened? Mr. Zahran met with him at that time, called him on the phone, the phone ringing off the hook, he said if you get between me and the insurance company I'm going to hire you for $6,000 and then I'm going to sue you for $600,000.

Now, this is your chance to say, hey, this shouldn't be allowed. This is not the way business is done. It's time to put a stop to this and to say the policy is void.

What about Mr. Portmann? Mr. Portmann knows what the story is. He knows there's going to be a dispute apparently. He wants nothing to do with it. He says I don't want to be involved in litigation. That's how most people are, isn't that true? And Portmann says I'm not going to sign the report, I don't want to get involved in it. And then he says I don't want to do the repair work because Mr. Zahran wants me to guarantee the tank. And I didn't build it. But I'm willing to do the repairs for $14,000, even though it's not established that the $14,000 necessarily is from wind damage. But here's Mr. Spalding giving them the benefit of the doubt and paying him $6274 for barn 151 and paying him $14,000 for the slurry tank.

And Mours' reports are in evidence, take them with you to the jury room. There's five records. Have a look at them and see what he went through trying to find somebody who Mr. Zahran had not rubbed the wrong way that wanted to get involved in this claim.

Now, they're not done grabbing for more though. Not only do they want what's covered under the policy, but they want to get so-called lost milk profits. So Mr. Kmiec hires Mr. Quarino, who he knew from law school who

he worked before in a case, to testify abut this, and what's the best he can come up with? The best he can come up with is Frankenmuth should have hired Merle Brander sooner. that's about all he can say. That was his only complaint about the claim file. We should have hired Brander sooner.

Well, put yourself in Mr. Spalding's position. He's got a responsibility at work to his policyholders, and he said I have estimates from Krueger and I have the Portmann findings and I'll give him the benefit of the doubt, I'll make the payment, I don't need an engineer to go look at this right now.

And then they talk abut this appraisal issue. I submit that's a red herring. There's an appraisal provision in the policy, and you can look it up, let's see if I can find the page here, it's on page 13.

(Reading) If either makes a written demand for appraisal, we will select a competent independent appraiser, et cetera.

There is no letter from Mr. Zahran saying I demand appraisal under the policy. All there was was just a reference to name your appraiser, I'll name my appraiser, but there was never a letter sent by Mr. Zahran saying pursuant to the policy provisions I demand appraisal under the policy. As Mr. Spalding said, if there hd been he would have made the appropriate response. And if you look at Mr. Spalding's letters, I think there's four of them in October and November of 1989, you'll see that he makes reference to that in one of his letters.

Professor Luening. I think here's the guy that knows farm management. You know, he gets hired, he's paid by the hour, he's going to render an opinion. What happens? He comes up with one opinion where he says that the lost milking profits are $78,000. That's following a meeting with Mr. McConcille and Mrs. Zahran, but that's not enough. They have to grab for more. So what happens? Mr. Zahran calls him the night before his deposition and talks - - works him over for

an hour over the phone. That's not enough. We've gotta increase that part of the claim. Bring it up to 230 cows and then I'll inflate my number even higher.

Mr. Luening said that from a farm management point of view based on the milk receipts, on average there was less than 100 cows and milk before the windstorm. Then he said that the actual 1990 revenues are only $19,000 less than 1989. And not only do they try to influence his data, but they don't give him all the facts. They only tell him about the payment that Frankenmuth made for the fire in July of 1990, but they don't tell him about the $183,000 that Frankenmuth paid in 1989, andhe said that would have a bearing on his opinion.

Then they claim, well, perhaps there's some consequential property damage becasue we didn't get 153 rebuilt and I'm going to make a claim for the stanchions of roughly $50,000. Mr. Zahran said that. But then if you look in the early documents with the sworn statement in proof of loss, the amount claimed for the stanchions is $10,500 not $50,000.

Then we get to the pump. Grabbing for more. The pump is first made reference to in the September 22, 1989 letter. Never mentioned up to that point. And then all of the sudden September 22, 1989, $15,000, he makes a claim for it. He admits it wasn't damaged. Then they claim they dropped the claim. It's not dropped anywhere. You don't find any letters where he dropped that part of the claim. It's another misrepresentation which we submit voids the policy.

Mr. Zeller, he was just a salesman. He sold buildings. He did an estimate in September of 1989. He's not an engineer. Unbelievably, he got up here ondirect examination and tried to make some assertions about what had to be replaced, but thank God our Constitution provides for cross-examination, because he admitted under cross-examination that 152 did not have to be replaced, yet that ywas in his proposal to replace 152 whether it needed it or not. Mr. Zahran knew that

152 was not damaged. How about 151? He identified only a couple of spots where there was damage in 151. One header beam had shifted over time. He mentioned a vertical beam at the door that appeared to be twisted. He admitted undedr cross-examination he didn't know if that was due to wind.

I've already talked about Mr. Khalidi. That's the kind of thing you should not put up with. This man didn't have any photos, he didn't have any report, who knew what to believe>

Then we have a fire in 151, in July of 1990. Mr. Zahran said he made a claim for the limit. When asked if Frankenmuth paid it you might remember that he first denied it. I showed them the check, the check is in evidence. It's dated October 31, 1990, it's in the amount of $75,000, Mr. Zahran endorsed it. Yet, his attorneys beleive that he's entitled to more money on 151. We submit that the answer is no.

I thought that the testinmony of Merle Brander was compelling. Here's a man that came here with his report. I welcome you to study his report, it's not very long. He came here with his photographs. He told you about some wind damage that he did see. He showed you the wind damage that he did see in barn 151 as of March 1990.

You might remembet that he showed the one storm brace and he said that the north wall was kicked out three to four inches. Well, that was repairable. That's what Mr. Krueger's estimate was about. But Zahran did not want to work with Mr. Krueger, because he wanted a show place, he wanted a new barn no matter what.

The special veredict form will have a series of questions. Question number one will be, did the Zahran's violate the policy provision relating to the misrepresentation, concealment or fraud by willfully concealing any material fact or circumstance concerning thier insurance claims? We submit

that the answer is yes. If you answer yes, that's as far as you have to go.

Question number two. Are the plaintiffs entitiled to monies under the insurnace policy as a result of the windstorm? We sumbit that the answer is no, that we paid them everything that they are entitled to and that payment was made on a timely basis. There's a break-out here for 151. the evidence is clear as to what we paid for 151. We submit that we don't owe them any more money.

152. you've seen the pictures. 152 is not damged, does not have to be repaired. The milk house and bulk tank, 151 as it's identified on the policy, there's no damage there. The slurry tank, we paid them $14,000. They haven't even effected any repairs to th slurry tank. There's no evidence that it's not being used or that it has to be replaced. And farm personal property. We broke that out for you in the August 7, 1989 letter, its' itemized with the inventory sheet, and we beleive that we paid them everything that they're entitled to.

There's a question about bad faith, did Frankenmuth act in bad faith. And the judge will give you an instruction as to what constitutes bad faith. Did the insurance company act reasonably, did they act recklessly, et cetra. Adn we submit that Frankenmuth did the best job they could. they acted reasonably, promptly, fairly, and that they're not liable for bad faith in this case.

We also aubmit that no monies should be awarded for punishment to deter Frankenmuth. I can't imagine what Frankenmuth did in this case that consitituted evil or was malicious. I think you got a chance to take the maeasure of the man when Mr. Spalding was on the stand. He's been in the insurnace business a long time. He tried to be fair, he tried to do the best job that he could.

In conclusion, ladies and gentlemen, we submit that Mr. Zahran just went too far, he violated the policy

provision, the policy is void and that you should answer the first question yes.

The way the court rules are, I don't have another opportunity to talk to you. I don't know if Judge Curran will let Mr. McConville talk to you again, or not, but once again, Mr. Kanaris and I and Mr. Spalding would like to thank each of you for listening to our side of the case. Thank you very much.

THE COURT: Counsel, you have five minutes.

MR. McCONVILLE: Thank you, Your Honor

REBUTTAL CLOSING STATEMENT

MR. McCONVILLE: There was no testimony that Mr. Zahran or Mrs. Zahran committed any fraud or misrepresentation. Nobody told you that. There was no testimony.

The prior proofs of losses in which Mr. Zahran did not get paid for he told you that he resubmitted them on subsequent proofs of losses. If he didn't get paid on the first proof of loss, he took that item and stuck it on the second proof of loss and said pay it; you didn't pay it the first time, pay it now. That's not a misrepresentation, that's not fraud.

No one from Frankenmuth told you that they overpaid Zahrans based on misrepresentation, did they? That's what you have to find before you can answer yes to that question.

MR. HOEY: Objection, Your Honor, that misstates the law.

THE COURT: Members of the jury, the court will instruct you as to the law that's applicable in this case. Proceed, Counsel.

MR. McCONVILLE: Thank you, Your Honor. Pay particular attention to that instruction. That instruction will tell you words along those lines.

If I can, I've got two more minutes. This is a bad faith claim. The bad faith here is this. And when you're instructed you'll be told this. In answering bad faith you may consider whether the Zahrans' claim was properly investigated and whether the results of the investigation were given a reasonable evaluation and review. That is, if they don't properly investigate the claim, they've committed bad faith.

Mr. Tillisch said it's like treating this as if this were your own home. Well, let's think about that for a second. You consider this as your own home. Guy by the name of the house doctor comes over, raps on your door and says I can fix this house for you, I'm going to put some bolts on it and we're going to shift it and put it all together. And then he doesn't stand behind his report? Portmann doesn't stand behind his report? Neither of them do. What does Mours tell you? Their own adjuster, their own adjuster said it had little or no value. That means their investigation at that point is zero. They need to go out - - Mours even said that, they need to go out and get another gut to say that it needed to be repaired. At that point replacement is still valid. That's what bad faith is all about. They did not do that. Mours told you they needed an engineer to support Portmann and Krueger. They didn't have that. That's bad faith. And you'll be able to consider that on the verdict. You'll see it right over question one, put down "no" and answer question number two "yes." And question number two is the bad faith question. The damages. You're going to have to mull through them a little bit. They're tough. Lot of conflicting testimony. but pursuant to Mr. Kmiec's argument, I think you'll find your way through that.

Thank you very much, and have a happy holiday season.

THE COURT: Members of the jury, these are a little lengthy instructions, so why don't you stand for a moment and we'll give you a chance to stretch before we start on those.

12/23/91 JURY TRIAL - CLOSING STATEMENT: PLAINTIFF

CLOSING STATEMENT

MR. KMIEC: Ladies and gentlemen of the jury, I guess I really didn't expect to argue today and I'm kind of in a disarray, but I suppose you've noticed there's been a little of that during the course of the trial in any event, so many items to cover in a case such as this.

Let me thank you , and I hop we can get out of here before Christmas.

Frankenmuth Insurance Company inspected and labeled the buildings and all of the farm items. Their agent did that before the insurance policy was issued, and that's Exhibit Number 1, Plaintiff's Exhibit Number 1. So, you can review that if you need to. The reason I tell you that is that Frankenmuth knew what they were insuring. And so then, of course, we had the storm on May 24th. The adjuster went out a couple days, Conaway that is, and he took some photographs, ran around the place with Mr. Zahran and he inspected the property.

Now, Mr. Conaway according to the testimony and the evidence promised to send an engineer out to inspect that slurry tank because an issue developed kind of early on that. That was never done.

As to barn number 151, Conaway observed - - he concluded that the east wall posts, the top of the east wall foundation moved eastward and the east wall of the second floor moved out abut six or seven inches.

If you recall Mr. Zahran indicated that he and Conaway had a discussion about trying to get a 60-foot boom in there, and the only one that was available I guess was a 40-footer to get in there to reach the top of barn 151 in order to be

able to do something with it. And that never occurred. That just simply dropped like a hot potato.

Now, Conaway, of course, was the one that hired Forest Construction, and they came out there with a come-along, which is a wench type of thing, and cables and that type of thing, and tried to pull the barn 151 back into place. Okay? And we contend that they didn't do that very well. And by the same token those were meant to be temporary repairs.

Pat Harlan, the supervisor again in the claim file, agrees with that, okay, that those repairs were simply meant to be temporary. For instance, Forest Construction, Mr. Nimmer, you'll notice in the file, he gave a quote for replacing barn 153, but he didn't give a quote for repairing barn number 151. And that was - the repairs there were simply meant to be temporary.

Now, the items, there are some personal items that were pointed out after the first proof -- well, after the first proof of loss. Mr. Zahran - - this may help you later because we've got so many items that are involved here and that type of thing. What I did is I blew up Plaintiff's Exhibit Number 2, page 92A. And this then shows the items that were paid on 8/7/89. So those items are not in issue. And you can just look through that.

The first one, for instance, is the ventilation system at 22 whatever that is, 851, I believe. And then you've heard the testimony that there was a second proof of loss and itemization of damages. That second one covered these items that weren't paid, it does not cover these that were paid. Okay? And , for instance, you'll see this ventilation system right here. See? They paid 6473 at this point out of that figure of 22,851, and it left that balance of 16,000, you see.

So, if you kind of follow these it's going to give you the picture of how things transpired. These figures in here, this 40,000 limit for 153, those are Frankenmuth's these large

ones. Well, you see that Frankenmuth note and this also Frankenmuth note.

Okay. And then the last figure is going - - the last item that was submitted, and this is really the figure that we're concerned with in terms of the overall damage that wasn't paid or underpaid.

Then we get into this conveyer. The conveyer is the same thing. At one time it's called the conveyer, another time it's called an elevator. See that elevator? That's the one that there was a price decrease on that from 4,000 to 46. And that's the record.

So, that's the one that there's an argument about how extensively it was damaged, and Robin Zahran indicated that he had junked it, he had left the two people take it, you know, and that type of thing, and he's never been paid for that.

And then these tandem running gears, he had been paid for a -- wagons, they settled on wagons. In the first proof of loss it was $5,000 for wagons. Two wagon boxes. There's a claim for 6,000, okay. These are just the boxes 6,000, they paid 4,000, okay?

And so this here, the tandem running gears are the wheels and the frame under those boxes, okay? And so, that figure is in there for $4200 for both boxes. That's never been claimed before, except it might have been - - it's claimed here, okay? He had a figure of $3200 that he could have brought it from a Tony Morreshik (ph) who went out of business, 3200, he would up paying 4200 for it from Gruetts and there's a bill in the claims file for the 4200.

The diesel tank again we indicated they paid for the underground tank, they didn't pay for the above-ground tank, okay? And there's a picture of a diesel tank and the prices are on there, okay? And with the exhibits. And then we have the cows that were unpaid. They paid for four cows initially, and then there were three other cows that were lost up to this

date, 3300. There was testimony that there were two more cows subsequently lost.

The statement from the vet, okay, is in the claims file substantiating that loss. so this loss, it's #1100 a cow is what we're estimating. So this loss, it's $1100 a cow is what we're estimating. So that's up to 5500 with the additional testimony.

Now, that pump for $15,000 as we mentioned, that's the one that fell into the pit, into the manure rather, they thought it didn't work and then they got it fixed and then the claim was withdrawn, okay, for that one. And there's a note in the claim file by the insurance company, is that, - - Earl Wildenberg told them that the one in the pit itself was okay and the one here is the one that fell into the manure.

So, and then we go into the value of the manure. It's going to cost 79,000 to replace it. Okay. We say, hey, if they claim there's a dispute s to whether or not the balance over $40,000 was covered under personal property, okay, as personal property, because he had only 40,000 on the specific coverage. You'll see that on what we call the declaration sheet in the insurance policy. Look at page 2 to 3 or something like that, okay? And it sets out all these numbers, okay, of 151, 42, et cetera.

So, you have an option if you, of course, feel that it should be replaced and the 14.000 was inadequate, to award that difference. It would be either 26,000 or else if you feel part of it is covered as personal property, award the entire amount as 14,000.

Now, the barns here are mixed up by Frankenmuth, okay? Just remember when you see the big figures, 151 is really 152 vice versa. All right.

So, now, and we're contending that barn number 152, at least $76,950 for lifting that roof, repairing the blocks, and Khalidi had testified that the rods were bent, and there's

nobody outside of Brander that doesn't say -- well, I forget exactly what Brander said. I guess he said there were some cracks in the blocks. But everybody else agrees that there was damage around all of the windows.

And that photograph, that wonderful photograph that Brander showed you where he climbed into the barn and took a picture of the rafters, that barn was just built a couple years ago. If you climb into the rafters it's going to look great. But the thing is the whole roof shifted. It moved east. That's what I was virtually arguing with Mr. Spalding about that. This whole darn roof shifted. Okay? It was a question about how far it shifted. There's no alternative. You gotta pick the roof up and you gotta redo it. And this was Zeller's estimate for 152. That was Zeller.

Now, 151, of course, was the one that was so much in controversy, the middle barn here. And we claim and everybody indicates it was twisted, it was off foundation. All you gotta do is look at the photograph after it was twisted back by Forest Construction and you can see the hole in the wall - - I'm sorry, the hole in the ceiling right there.

Page 8, picture number 2. That's after they -- that's after Nimmer was there, okay, twisting it around the stuff, right? This picture was taken by Conaway. Gave that to Zahran as he did a number of these pictures. I'm totally stymied why Mr. Brander when he testified, why he didn't refer to any of these photographs, you know. They were taken just a couple days after the windstorm. He kept referring to his photographs that were taken on March -- in March of '90, okay, when he had those available to him. The insurance company, of course, had those in their own file, that type of thing.

Okay. In any event, we feel that he's entitled to the entire coverage of 75,000. Now, you may think and Zeller gave an estimate on what it would cost to replace that building. Mr. Zahran testified that it cost him over $180,000 in '83 and

into '84 to redo this building. He spent , $100,000 was his figure, to remodel and to restructure this building, okay? It was so important to him, if you recall, because he knew what he was going to be doing. The next thing he did almost contemporaneously with this repair was to add on this building, okay, 152. So, this building was in great shape, in spite of what Brander might say.

So, replacing it for 65,000 plus, I think it was 65, it was 78,000 was the figure. Okay. And then to cap the concrete, electrical costs and that type of thing. So Zeller I think was at 65 plus the additions. In any event, we're well over the $75,000 limits on that one. And I think you should award that. And I think you should consider not deducting that 14,000 that was paid to Mr. Zahran, you know from the 75,000. You, of course, can do what you like in that respect, but the facts is that he had to use that money to temporarily put protection around this barn, okay, for that winter. That caused so darn many problems, you know, as we'll talk a little later about the consequential damages. So I think you should – I would ask you to award him the entire 75,000 on that.

Then the barn that there is some dispute about coverage, well, it didn't make any sense to me. They don't know whether they're covering it or not, and they don't know if they're covering it under 151 or 154, but there's no question that Mr. Zeller gave us an estimate on here of 25,500 to redo this barn. He gave you all the reasons for that. And the total claim is twenty-seven five, but he coverage is 25. Okay? so you would – those are the limits of his coverage. I would ask you to give him the 25 on that.

We got quite a total there, but we've got quite a substantial operation, and the figures are there.

Now, I don't particularly want to be repetitious, but on 151. The cabling operation in an attempt to do

something with the building was unsuccessful. Frankenmuth admits that. The photographs prove that up.

Zeller indicates it's gotta be repaired. Khalidi, you remember Khalidi, he indicates there's structural damage there. You can't attach -- you can't build a new barn and attach it to that. Brander said its okay. As long as you kind of keep them separate it's not going to make much difference. You know. So I don't know, I like to think that you're convinced that 151 -- he should have gotten the total coverage so he could have replaced that barn.

Dr. Krueger, you remember him, he got up, he practically fell in the jury box I think, and he was their time-tested court expert. He didn't have to be asked questions. I like to think of him as a part of the team. He was in court, he was hired because, as Mours said and as we pointed out, he's good in court, he's had success.

So, my contention is he really wasn't hired to do an evaluation here, a legitimate one; he was hired really in the middle of the claims investigation is what he was hired, and he really told them what they wanted. but even given that, if you took a look at his estimate, he's got more rods and bolts and plates, you know, to kind of stretch this thing back and pull it together. As Khalidi said, you can't do that with wood. The wood is blown in one direction, now you're pulling it back in another direction. And it's just not going to be the same barn. You're going to have just too many problems in the future. And as Mr. Spalding indicated at page 44 of Exhibit 2, he's going to have to have it adjusted again or inspected and that type of thing, because after the cable towing and bracing the roof structure apparently now doesn't fit.

Any evidence or argument in reference to that 151 shouldn't be covered because it was poorly constructed or there was one rotten beam or it was dilapidated or something, Conaway said. We take issue with those contentions to begin

with, okay. The barn was in excellent condition. But giving the devil its due, it doesn't matter. The fact is that they insured that barn for $75,000. You don't come in and tell somebody, well, the wind wouldn't have done this or something or another had the barn been in some sort of super-duper condition and consequently we're not responsible, you are responsible. They inspected the barn, okay? They issued the coverage after they looked at the barn. All right? So they take it as it is.

Now, the same thing applies to number 152. If you recall Krueger. Well, there are no expansion joints or pilasters in these wall, allowing for the walls to expand and stuff such as that. It doesn't matter. The fact is if they're saying the building was defective, so what? The facts is that it's covered and the wind damaged it. Okay? I mean, they saw it before. Nobody tried to defraud them or anything such as that about what they're covering. Okay? And it's one heck of a time to be saying, well, you know, it didn't have this or that and consequently for some reason we're not going to pay.

Such things as, you know, again getting back to 151, there was reliance upon Thiede's estimate by Mr. Spalding, that that was the reason how they got ultimately to 14,000. I'm here to tell you that that $14,000 figure was just pure speculation. How they jumped from twelve-five to 14 is beyond me. And then to deduct the fan out of there yet and not pay him for that was a travesty.

But, even if Thiede's estimate of 12,800-and-some dollars, that didn't even consider doing with this what it was before. Okay? Before, this barn was connected to this barn. It was all contiguous. It was one -- it was one area. All right? And to say that, well, we're going to put a sheet -- we're going to put some metal over here for you and cover that end and that takes care of you, that puts you back to where you were, well, that isn't fair. The fact is the way it was is the was it is now, or as you see it there, and the way it should be. And

any modifications in terms of repairs shouldn't be the basis for using , you know, a figure that somebody gives you to repair.

Again, the central theme here, we tried to point that out to you in our opening statement and when Robin Zahran was on the stand, when you take the roofs off this, this is one operation. The whole thing is one operation. And it's gotta flow that way. Without that, you know, you're going to -- you don't have what you had, okay, and you don't have the type of business plan that he ad there in operating a very up-to-date dairy farm.

Now, the hour is late and I'm trying to run through this. Now, the -- at page 45-1 of Exhibit 2, our claim file again, this is a discussion with Earl Wildenberg and Mr. Spalding. They 're talking about the fact that the tank may have to be replaced. You know? He knows that. And they really did nothing, nothing effectively, okay, to look into it and do a good job of evaluating it. They didn't get an engineer in there, as I mentioned to you before, until after the lawsuit was started.

Excuse me a half a second.

(Pause.)

MR. KMIEC: Now I can't find what I'm looking for. Thank you.

In addition to those losses, okay, I don't have a blow-up like that for these items, but they've been testified to and I'd like to ask you to consider these items. There was a milk loss on the day of the storm, okay? And that's been testified to in the amount of $797.55. The electricity went out if you recall and they lost milk. The silo pipe and door. I don't believe that's on here. They never paid for that. Do you recall that was a $398 item? The cows went from three to five. And there were 2,000 bales of hay at $1.50 rather than 2.50 for a total of $3,000.

Now, the other thing is that we went to great pains to show what happened because of the disaster of the winter coming on, you know. And the fact that he had to decrease his herd, do you remember, for a couple months there, the heifers that he had prior to the tornado, they were able to come back and so, therefore, they were able to produce more milk. And then they were selling some cows so they had more income there for the first couple of months after the storm. But then gradually because they couldn't house the cows -- the amount of cows that they had before and those that they planned on having increasing the herd. And if you recall that figure was that $183,370. Okay? That was the figure that Professor Luening took all the pains to come up with. And he's got credentials all over the place. If he tells you that's what he lost, okay, that's what he lost. The question before you, of course, is whether or not it was because of Frankenmuth's conduct in denying claims or underpaying the claims, particularly building number 151.

Some of the things that are so glaring and I think you should look at is the fact that this appraisal process, okay? This darn thing -- and this is the area you're going to be asked -- I mean, the special verdict is going to ask in addition to the damages that I've been talking abut already whether or not Frankenmuth's conduct was in bad faith and whether it was in reckless disregard of the rights of Robin and Karen Zahran. Okay. And if you find that, yes, their conduct was, then you're going to be able to make an award of punitive damages to penalize an insurance company for not paying legitimate claims. It's an area that I think you should consider seriously.

When you do consider that area, if you feel that their conduct was unreasonable, if you feel that their conduct was in reckless indifference or disregard of Robin and Karen's rights, okay, then I think you should really consider penalizing them because, you know, when you do that, believe me, in a

case such as this don't think of yourself as a jury sitting here on the 23rd of December in Milwaukee county and nobody's going to hear you, and that this doesn't make any difference. Believe me, it will make a lot of difference. These cases, there's a lot of attention paid to these kind of cases, okay? If you think that their conduct was as I've indicated, okay, and that type of thing, and you penalize them, a lot of people are going to hear about this. It's going to be heard no just in Wisconsin. These cases get published and that type of thing, get written up, and you can bet your life that somebody in California is going to read about it if there's something significant that comes out of this, and somebody in New York as well.

So, these are very important cases because they help a whole lot of other people. Now, we're submitted annual statements with the court for -- in terms of the financial worth of Frankenmuth Insurance Company, and I believe you'll be able to refer to those. And that may give you some idea as to what to do if you feel that they should be penalized, because their wealth has quite a bit to do with the amount of any potential penalty.

In concluding, I don't want to get particularly melodramatic, but, you know, Frankenmuth was from my perspective pretty ruthless in this case. And the approach , and it's a defense team approach. You can tell from the people they put on. You put on a Mike Tilleisch who came here from Florida, and God knows what they paid him to come down here to really say nothing. What did he tell you? You know, he was on that stand for I think about 10 or 15 minutes and off and that was it. And the only thing he told you was that I hired him once five years ago. That's about it.

And that's supposed to make some sort of an impression with you. The fact is that all he did was to get up there and tell you that, well, I don't think their conduct was in bad faith. You can decide that. You're in a position-- you

heard the testimony. Some of it was a little disjointed, I apologize for that. Didn't come in as clear sometimes as it should. Sometimes if we're pressed for time or something we couldn't put it in as smooth as we'd like to and often we did it repetitiously I might add.

But, and that applies uniformly to the whole defense team here. Brander was just something else again. To bring Brander on, you know, after a lawsuit is started, not to have hired him to begin with, that's utter nonsense. If they would have hired him to begin with, we had Khalidi, the two of them would have got together, they would have got another guy and the whole thing would have been resolved. We wouldn't have to be here. Believe me, Robin didn't want to be here in court. He wanted to get the buildings back together and up and get that farm, that dairy business operating before winter set in, and he could have done it.

And the, you know, the other thing is to turn around and to viciously attack Robin Zahran and Karen I think is just way out of place. They're calling them a fraud; that he misrepresented. Well, if filing a claim and trying to get what you got coming and to try to get, you know, the value that you think you should be getting is wrong, if you can't argue with your insurance company about what you got coming, well, that's utter nonsense, you know, without being called a fraud.

So, I think personally that Robin Zahran was -- you know, he put on a pretty strong type of personality and that type of thing, I know that, but you can see that he was frightened for his future. I mean, that family, they really had their finances on the line. They were really having a tough time of it and I think they're very fortunate that they pulled out of it. And I don't think insurance companies should be allowed to bargain with their insureds. You pay the claim. You don't' say, okay, you want 100,000,

12/24/91 JURY TRIAL

PROCEEDINGS

(Outside the presence of the jury.)

THE COURT: Let the record reflect that all counsel are present.

Counsel, you indicated that you wanted to put something on the record prior to the jury returning with its verdict?

MR. KMIEC: Yes, Your Honor. During the conference with your law clerk, Mr. McConville appeared and he objected to question number one that is on the special verdict. So I'd like to just be sure that that's a part of the record.

And from a practical standpoint at this time, in that the jury has the special verdict in their possession, I would ask that the court modify question number one at least to this extent. I would ask that the court put it as the last question the special verdict. Alternatively, to strike the second paragraph which is that "If the answer to the preceding question was yes you need not answer any of the following questions; if the answer was no, please answer the following question," I would ask the court to strike that. And we've accommodated the defendants in their request to strike the question number 5B after the verdict was in the jury's possession, so they've

opened the door on that and I think it would be appropriate -- I mean, at least I think that give us the precedent to do that in terms of that paragraph.

I had indicated to the court as a preliminary matter, of course, that we had requested that question number 1 be eliminated in totality on the basis that there was absolutely no evidence in this record that would support the inclusion of

that question on the special verd
the only person that was in a pos
offer evidence on that issue wou
he didn't touch, didn' t touch tha
maintains that the filing of a esti
tank in the amount of 79,000 wh
an act of fraud. I think that wou
take, and I don't think I need to g
respect to our position in that res
get an estimate for somebody for
as to what it would take and then
there is ample evidence in the rec
and Frankenmuth it's been establ
limit 40,000. So they apply the li
are that are submitted. Thank yo

THE COURT: Mr Hoey?

MR. HOEY: Your Honor, we set up the violation of the misrepresentation concealment of fraud provision in our answer in counterclaim filed a long time ago. We believe that if that provision was violated by the insureds, that that's the end of the analysis; that one need not go further. And what can I say? It's in the special verdict form. The instructions were specially tailored to this verdict form. The jury has been instructed and they're now deliberating.

THE COURT: Well, as you know, counsel, this is the first time that this objection has been brought to the court's attention. I don't quarrel at all with the fact that you may have discussed it with the law clerk, but I was not made aware of it at our conferences on Monday or any of our subsequent meetings.

I'm concerned about, first of all, the timeliness of the objection. And I apprecaite you had a lot of other things on your minds yesterday when the speail verdict form was given

to you, but it's a little bit hard for me to understand how you could have argued the case to the jury with the special verdict in hand and not recognized the objection.

Be that as it may, it does seem to me that question number one is a threshold question. In other words, if the jury were to find from the evidence that the plaintiffs did violate the policy provisions regarding misrepresentation, concealment or fraud, then it would seem that that on the basis of the contract of insurance would make the answers to the other questions meaningless. I grant you, Counsel, as I have said in other situations with this case, I don't think the evidence is very compelling, but certainly I can't agree that there wasn't any evidence as to misrepresentation or fraud. I think Mr. Zahran's testimony certainly would tend to lend some support to that.

Counsel brought out that he was a sophisticated person with experience in the insurance field generally and, thereofre, would be perhaps more knowledgeable of matters of this kind than the average insured.

I am uncomfortable with the second part of your request in which you ask that the instructions that follow question number one be delineated and that the jury be instructed to disregard those instructions. It would seem to me that now we are approximately two hours into their deliberations, that I would guess they're pas question number one already. Now I may be wrong.

MR. KMIEC: I hope you're right.

THE COURT: I can appreciate your concern and it does raise some interesting legal questions in this particular type of case. But I really don't feel that there is any better way of approaching the matter at this stage than to allow the verdict to continue on as it is in the form that it is and trust to the competency of our jury system. they may correct our mistakes.

MR. KMIEC: Your Honor, just in terms of -- and I understand that I assume the court has tentatively ruled at least on our request. It's a new area of law, there isn't much case law on it, and we may be in a position to -- you know, to set some standards in respect to those kind of issues. It just doesn't make sense to me that you void legitimate claims because of some alleged misrepresentation. The question --

THE COURT: I think the theory, Counsel, on that is that courts have held that there is no other way of preventing people from making false claims if there is no penalty associated with it. In other words, why not inflate your loss because the worst that coan happen is that they're going to cut you down.

Well, our courts have held that there's got to be some way of prohibiting this practice, and one of the ways that they have permitted is the provisions in a policy which causes the policy to be voided if there are such fradulent misrepresentations as to material facts. And I think the instructions clearly distinguish between somebody who merely overvalued his loss as opposed to somebody who surreptitiously or otherwise attempted to conceal the true value and the true los. I thnk the only way that we could have a viable insurance industry today would be if that type of procedure and that provision were honored.

I think on the other hand the greatest safeguard from the insured's standpoint is the jurors I think have a tendency to excuse those acts if there is evidence - - or excuse - - at least in those cases that we're tried here that's been by experience that they have done a pretty good job of excusinginsureds.

MR. KMIEC: I think that area of law isn't defined as well as it could be, and my perspective is that is somebody represents as to an item that isn't particularly significant that it shouldn't be punitive in nature and then he

can't collect on a substantial item. We don't know what the jury's thinking is in a question such as this. Okay?

They may find that, well, he submitted a proof of loss where he submitted a claim based upon an estimate for the entire slurry tank, okay, but the coverage is only 10,000, but he shouldn't have done that somehow. He should have been 76, and I know my coverage is 10, so pay me the 10 or something such as that I suppose. But, my gosh, everybody I'm sure would sumbit an estimage, okay, for the insurance carrier is sophisticated enough to be able to make --

THE COURT: But the instructions clearly distinguish those acts from the type of act that constitute a vasis for voiding the policy.

MR. KMIEC: See, I'd like to see the law defined in terms of what items were misrepresented. And if they were misrepresented, then that itme should be stricken from the claim. That I can appreciate. But not to somehow go back and wipe out even claims that were paid. They're seeking reimbursement for the $182,000 if the jury answers that questin yes. That's been their stated position to me.

THE COURT: Well, if there is support for that the court would be glad to look at it, but I would strongly question in the manner in which these checks were tendered that there would be a basis for that, Counsel.

MR. KMIEC: I guess, as I mentioned to the court on the phone, I hate to see incomplete verdicts especially in long trials. If we had the entire verdict completed then we'd simply have issues of law left folowing that, but at least we'd know about the how the jury felt about the facts!

THE COURT: The part of the instruction that I was referring to, Counsel, it says an exaggerationof the value as a mere opinion, a mere misstatement based upon an erroneous estimate of value, an honest mistake, an innocent overvaluation

lack the essential elements of fraud and do not operate to void the policy.

In other words, not only must it be a material matter, representation, but it also has to be more than just an exaggeration.

In this day and age of advertising and other fields where exaggeration seems to be the commonplace rather than the exception, I think jurors probably tolerate exaggeration better than they might otherwise a generation ago.

MR. KMIEC: I hate to belabor this, but assuming the jury answers that fquestion yes that he misrepresented, okay, there's nothing on the verdict indicating at what point in time he misrepresented. How do you handle that? We're going to be arguing about that after the verdict, and we're going to be guessing. We're going to be guessing as to what item was it, at what time.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs,

Case No. 95-C-0334

vs.

GERALD S. SCHMIDT, JR.,
ROBERT C. BURRELL,
MARIAN R. KMIEC, and
CHRISTOPHER S. McCONVILLE and all
atttorneys of law,
and ABC(s) INSURANCE COMPANIES,
Third Party Defendants,

ROBIN ZAHRAN and KAREN ZAHRAN
Plaintiffs,

Case No. 95-C-1281
Plaintiffs demand trial by jury

vs.

LARRY MOURS, PAT VICKERS,
ORVILLE KRUEGER, MERLE BRANDER
ROBERT SPALDING, MICHAEL TILLISCH,
JOEL PRTMAN, KATHRYN RASMUSSEN,
REGINALD BASMUSSEN, LEO HARRIS,
JEAN HARRIS, and the
MANITOWOC COUTY SHERIFF DEPART.
of MANITOWOC, WIS. and other
named defendants,
Defendants.

PLAINTIFFS' MOTION TO CONSOLIDATE CASE NUMBERS 95-C-334 and 95-C-1281

NOW COMES Plaintiffs, Robin Zahran and Karen Zahran, appearing pro se and in their behalf, and pursuant to Rule 42 of the Federal Rules of Civil Procedure moves this Honorable Court to consolidate the cause of actions entitled ROBIN ZAHRAN and KAREN ZAHRAN V. GERALD G. SCHMIDT, JR., et al. no. 95-C-0334, and ROBIN ZAHRAN and KAREN ZAHRAN V. LARRY MORS, et al. No. 95-C-1281. In support of the Motion to consolidate, Plaintiffs, Robin Zahran and Karen Zahran states as follows:

AFFIDAVIT OF JERRY ZELLER

The undersiged being duly sworn deposes and says:

(1) That I am an employee of Morton bukldings Inc.

(2) That Pet Harmon of Frankenmuth Insurance Company contracted me in 1990, and employed myself and Morton Buildings to render him an opinion and to confirm damages to the property of Robin and Karen Zahran.

(3) That Frankenmuth paid monies to Morton Buildings for me perfrom that service for them.

(4) That at no time was myself and Morton Bukldings hired or have been contracted by Robin Zahran or Karen Zahran to represent them in adjusting or rendering an opinion regarding a fire loss.

(5) That my approval of the damages caused by the fire were not an approval by me to bring the property to the pervious condition, as I could not dso.

(6) That in June, 1992 sometime, Robin Zahran stated that Frankenmuth alleged that Jerry Zeller and Morton Buildings were Zahran's contractors.

(7) That in Juen, 1992, I was contracted by Robin Zarhan questioning me about the accuracy of him hiring me as his contractor in that fire loss.

(8) That on July 9th, 1992, I called Robin Zahran and the office of the attorney for Frankenmuth Insurance Company to clear up any false statements and put Frnakenmuth and its' attorneys

straight that myself and Morton Building were hired by Frankenmuth Insurance Company.

(9) That the attorney for Frankenmuth refused to come to the phone at that time.

(10) that Robin Zahran spoke to the attorney's secretary of the fact the statements were false, and that Morton Building was not the contractor for Robin Zahran in the phone conversation of July 9th, 1992.

_____
Jerry Zeller (signed)

Dated July 13, 1992
Subscribed and Sworn to
before me this ____(13th)
day of July, 1992.

_____
Notary Public (Karen Carpenter)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN and KAREN ZAHRAN
Plaintiffs

No. 90 C 337

v.

FRANKENMUTH MUTUAL INS. CO.

Judge Thomas J. Curran

Defendant

DEFENDANT'S TRIAL MEMORANDUM

This is an action against the Defendant insurance company to recover under an insurance policy for damages allegedly sustained as a result of a windstorm occurring on May 24, 1989. Plaintiffs allege breach of contract, breach of good faith and breach of an Illinois statute. The insurer has asserted four affirmative defenses: neglect, failure to take reasonable steps to protect the insured property subsequent to a loss, fraud and limitation of liability pursuant to the policy. The insurer also counter claimed against the Plaintiffs for misrepresentation, concealment or fraud.

Factual Background of the Action

On August 5, 1988, the Defendant insurance company (hereinafter 'FRANEKNMUTH'), issued a farmowners' policy

of insurance to ROBIN and KAREN ZAHRAN (hereinafter "Plaintiffs"), to insure certain property located at 18422 Rosecrans, Denmark, Wisconsin, known as "Acorn Hill Farms" (hereinafter, the "Farm"). The policy, No. FR 0423155, was effective from July 19, 1988 to July 19, 1989 and insured the farm subject to enumerate limitations on each structure.

On or about May 24, 1989, while the policy was in full force and effect, a windstorm damaged certain of Plaintiffs' property insured under this policy. On July 25, 1989, Plaintiffs submitted a Sworn Statement in Proof of Loss claiming damage of $240,300.37. On September 8, 1989, Plaintiffs claimed an additional $180,564.67. Most of the Plaintiffs' itemised claims were at or above the policy limit for that structure. Specifically at issue in this case is Barn No. 151, for which Plaintiffs claimed wind damages "in excess of $75,000," the policy limit.

FRANKENMUTH visited the site of the loss and thoroughly inspected the damage. The loss was adjusted and FRANKENMUTH paid Plaintiffs $182,888.37, which included $22,223.40 for Barn No. 151 Plaintiffs cashed the check and subsequently filed this suit. No substantive repairs were made

to Barn 151. Very little of the money FRANKENMUTH paid was used to repair the Barn.

On March 18, 1990 a chimney fire damaged residence of the farm. An inspection was conducted, and FRANKENMUTH paid Plaintiffs' $3,000 pursuant to Plaintiffs' repair estimate.

On July 8, 1990, a fire occurred on the Farm causing further damage. FRANKENMUTH again visited the site of the loss and thoroughly inspected the damage, Once again, many of the Plaintiffs' claims were at or in excess of the policy limits for each structure. Barn No. 151, the structure in which the fire originated, was a total loss. FRANKENMUTH adjusted the loss and a check was issued to Plaintiffs. FRANKENMUTH paid the policy limit, $75,000, for barn 151. Again, the check was cashed and suit was filed against FRANKENMUTH seeking more money. That case is now before this Court and is a separate action.

FRANKENMUT'S AFFIRMATIVE DEFENSE AND COUNTERCLAIM

FRANKENMUTH asserts an affirmative defense in this case based upon the subsequent fire loss to Barn No. 151. This

affirmative defense asserts that any damages that may be awarded against FRANKENMUTH be reduced or diminished by the subsequent $75,000 payment made to Plaintiffs for the total loss by fire to Barn No. 151.

Furthermore, FRANKENMUTH filed a counterclaim against Plaintiffs alleging that Plaintiffs have made excessive claims, misrepresented or concealed material facts and fraudulently and falsely swore regarding those claims. The policy, by its own terms, is void if the insureds is found guilty of misrepresentation, concealment, or fraud, and Plaintiffs would be liable to FRANKENMUTH for all sums previously paid by FRANKENMUTH to Plaintiffs.

POINTS AND AUTHORITIES FOR THE COUNTERCLAIM AND AFFIRMATIVE DEFENSE

1. The Subsequent Total Loss from Fire Affirmative Defense

An insured may not collect the policy limits for a total loss two times during the policy period absent total repair or replacement of the insured property between the events. It is

logically inconsistent to award the insured successive total losses without requiring repair or replacement of the "lost" property. To hold otherwise is tantamount to doubling the value of the policy without raising the premium, a consequence not intended by either of the parties. To hold otherwise would allow Plaintiffs to profit from the windstorm claim and subsequent fire.

a. Any Further Damages for the Wind Loss Should Be Offset

Several English Common Law courts have denied the insured recovery where a covered partial loss damages property which is later totally lost due to an uninsured event before repair from the partial loss. Livie v. Janson, 12 East. 648 (K.B. 1810); Brisish & Foreign Ins. Co. Ltd. v. Wilson Shipping Co., Ltd., ! A.C. 188 (H.L. 1921)

If the property, whether damaged or undamaged, would have been equally taken away from him, and the whole loss would have fallen upon him had the property been ever so entire, how can he be said to have been injured byhits having been antecedently damaged?

12 East. at 654. That court reasoned that the first loss was "immaterial" because of the subsequent loss. Id. Unrepaired partial damage is, in effect, erased by the "total loss." SCAC Transport (USA), Inc. v. Atlantic Mutual Ins. Co., 652 F. supp. 1091, 1094 (S.D.N.Y. 1987) The SCAC decision followed the English Common Law finding that the insured may not recover for unrepaired partial damage caused by a covered risk where subsequent uninsured total loss destroys the property. Id.

b. Plaintiffs' Attempted Double Recovery

It follows that Plaintiffs could not have two total losses on the same structure without complete repair or replacement after the first loss and before the second loss. FRANKENMUTH paid Plaintiffs to repair the damage sustained in the windstorm. However, Plaintiffs contend that Barn No. 151 was a total loss which could not be repaired for the amount of money FRANKENMUTH paid. Due to the subsequent total loss of the barn, the partial loss is "erased," having merged into the total loss.

If the first event was a total loss as Plaintiffs contend, then the barn had no value at the time of the fire since Plaintiffs did not effect a total repair or replacement. Not surprisingly, Plaintiffs claimed the barn was a total loss after the fire. FRRNAKENMUTH paid the policy limit. In Kupfersmith v. Delaware Ins. Co., 86 A. 399 (N.J. 1913), the court awarded the insured only nominal damages for the second of two losses because the insured had vacated the structure after the first loss and could not prove that the building had any value. Id. at 400.

Where no financial or pecuniary loss has been sustained by virtue of an event, there can be no recovery. Edlin v. Security Ins. Co., 160 F. Supp. 487 (S.D. IL 1957) It logically follows, contrary to Plaintiffs' contentions, that one could only have one total loss without repairing or replacing the "lost" property.

Other Courts have held that the insured is entitled to recover the total of the insurance policy once. In two cases, the insured property sustained a parital loss and subsequent total loss, which were both covered under the policy. In Ezra Trull v. The Roxbury Mutual Fire Ins. Co., 57 Mass 263 (1849), the

insured had completed repair of the partial loss before the property was totally destroyed. That court held, as did the court in Crobmie v. Portsmouth Mutual Fire Ins. Co., 26 N.H. 389 (1853), that the insured could recover up to the total of the policy only once, regardless of the number of occurrences.

c. Double Recovery Is Unjust Enrichment and Contrary to Public Policy

It is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another. Hartford Accident & Indemnity Co. v. Chung, et al., 1981 F. Cas. 1337 (1981). Where two insurance policies were maintained on the same property which was lost to fire, the insured is not entitled to total loss recovery on both policies. Id.

Plaintiffs would be unjustly enriched if permitted a full recovery for the wind loss because that very same property was subsequently lost to fire. Following Plaintiffs' logic, if the wind loss was a total destruction under the policy, he had nothing to lose from the fire. Therefore, even if Plaintiffs could prove that the barn was a total loss from the windstorm, they were fully compensated for the loss after the fire. In that case, the

$22,000 payment on the wind loss would be due and owing to FRANKENMUTH since Plaintiffs would be unjustly enriched.

signed by James Hoey

Clausen Miller

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

ROBIN ZAHRAN and KAREN ZAHRAN,
Plaintiffs, Case No. 90 C 337

v.

FRANKENMUTH MUTUAL INS.CO.

Defendant.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR A NEW TRIAL OR, ALTERNATIVELY, MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

INTRODUCTION

A jury trial was held in the aforementioned case on December 16, 1991. Both parties rested on December 23, 1991. The verdict went to the jury in the from attached to ChristopherA. McConville's affidavit as Exhibit "A".

On December 24, 1991, the defendant, Frankenmuth Insurance Company, requested that the verdict be modified to exclude Question Number 5(b). At said time, the plaintiffs reiterated their objections to special verdict Question Number 1 and requested the court to withdraw said question or modify the

question in accordance with the law. The court granted defendant's motion to modify Question Number 5(b). However, the court denied plaintiffs' motion.

At or about 2:30 p.m. on December 26, 1991, the jury concluded its deliberations and answered "yes" to Question Number 1 of the special verdict, thereby precluding any further answers to the remaining questions on said verdict. This brief is in support of plaintiffs' motion for a new trial on the issue of misrepresentation, bad faith and breach of contract or, in the alternative, for judgement notwithstanding the verdict changing the answer of special verdict Question Number 1 from "yes" to "no" and adding "yes" to Question Numbers 2, 4, and 6 and amounts to the remaining damage questions to be added in accordance with evidence at trial.

ARGUMENT

I. STANDARDS REGARDING THE APPROPRIATENESS OF A NEW TRIAL OR ALTERNATIVELY, JUDGMENT NOTWITHSTANDING THE VERDICT.

The court has the inherent right to set aside the jury verdict and order a new trial if it believes a fair trial has not

been achieved. St Clair v. Pipal, 611 F. Supp. 911, 915 (E.D. Wis. 1985); Fort Howard Paper Co., v. Standard Havens, Inc., 119 F.R.D. 397, 407 (E.D. Wis. 1988); and Valbert v. Pass, 866 F. 2d 237 (7th Cor. 1989) In disposing of the motion for new trial in this regard, the district court must decide if the trial was unfair to the moving party. 866 F. 2d at 237.

Furthermore, the trial can grant a new trial on the ground that the jury verdict is contrary to the clear weight of evidence adduced at trial. 611 F. Supp. at 915. As a matter of law, the court must find that the record does not contain sufficient factual foundation to vitiate the jury verdict. 611 F. Supp. at 914. (Emphasis added).

The court must decide if the verdict is against the weight of the evidence in desposing of a motion for a new trial. 866 F. 2d at 237. In weighing the evidence, however, the court need not view it in the light most favorable to the non-moving party. Smith v. Trasworld Drilling Co., 773 F. 2d 610, 613 (5th Cir. 1985). Moreover, if the verdict is contrary to the law and the evidence, or evidence was admitted or excluded improperly during the course of the trial, thereby prejudicing the moving

party['s rights to a fair trial, the motion for a new trial is proper. Pool v. Leone, 374 F. 2d 961, 962 (19th Cir. 1967) and Peterson v. Calmar Steamship Corp., 296 F. Supp. 8, 12 (E.D. Penn. 1969)

Lastly, where there is not substantial evidence to support the verdict, judgment notwithstanding the verdict is appropriate. Allen and O'Hara, Inc. v. Barrett Wrecking, Inc., 898 F. 2d 512, 514 (7th Cir. 1990). These aforementioned grounds for a new trial and judgement notwithstanding the verdict will be ap0plied to the remaining substantive arguments within the brief.

II. DTHERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A VERDICT ON MISREPRESNETATION. THEREFORE, A NEW TRIAL IS APPROPRIATE.

A. **Defendant failed to establish the necessary elements of misrepresentation.**

The elements of misrepresentation include the following: existence of a representation of fact must be made; such representation was untrue; said untrue representation was made knowing that the representation was untrue or recklessly without caring whether it was true or false; representation was

made with the intent to deceive; and induce the party to act upon it to a party['s damage. Wis. Civil Jury Instruction 3100 and Wis. Civil Jury Instruction 2400 is modified by Tempelis v. Aetna Casualty and Surety Co., 164 Wis. 2d 17, _27 N.W. 2d __, __(1991). At this juncture it is important to note that the plaintiffs do not concede that reliance is not a necessary element as referenced within the Tempelis case. That is, some amount of reliance is necessary in regards to the materiality element of fraud as stated within Nolden v. Jutual Benefit Life Ins. Co., 80 Wis. 2d 353, 360, 259 N.W. 2d 75 (1977) and Northwestern Nat'l Ins. Co. v. Nemetz, 135 Wis. 2d 245, 262, 400 N.W. 2d 33 (1986)

From the evidence presented at trial by the defendant, Frankenmuth, it is obvious that they fell short in their burden of proof on misrepresentation except for one element. There is no doubt that the plaintiff made representations of fact to Frankenmuth in regards to the May 24, 1988 loss. However, there is insufficient evidence in the record to support the remaining elements of the defendant's counterclaim for misrepresentation.

Frankenmuth failed to present evidence that any of the plaintiffs' claims were untrue and made by the Zahrans knowing the representations to be untrue or recklessly without caring whether it was true or false. The Zahrans fully complied with Frankenmuth's request to provide Proof of Losses and estimates verifying the loss amounts. These representations are true. Likewise, the representations in the form of estimates were produced from other sources and were true. Therefore the plaintiffs put forth truthful representations and truthfully relied upon others in assessing damage to their farm. The defendants put on no evidence which would indicate otherwise.

All Frankenmuth did at trial was to rebut damage amounts and the extent of damage through experts. these experts were utilized to suit the defendant's needs and their unilateral assessment of the damage. This in itself, does not constitute misrepresentation.

More importantly, Frankenmuth failed to put on one iota of evidence indicating that the plaintiffs intentionally deceived Frankenmuth's pecuniary damage. (Emphasis added). It is well established law in the State of Wisconsin that in order

to establish misrepresentation, there must be intent to mislead the insurance company and to induce the insurer to act to its detriment. Fink v. La Cross Mut'l Fire Ins. Co., 203 Wis. 350, 357, 234 N.W. 339 (1931) Conflicting and controversial evaluations of an insured's property and amount of insurance declared in a Proof of Loss are not justifications for misrepresentation. In fact, conflicting and controversial evaluations of property and their amounts supported a jury[s finding that insureds were not guilty of false swearing that would have voided their fire insurance policy in Great Southwest Fire Ins. Co., v. S.M.A., Inc. 474 A. 2d 950, 953-54, 59 Md. App. 136 (1984). Even despite an insurer's contention that an insured's inventories of dood damaged were speculative, this did not constitute fraud absent proof of insured's intent to defraud. Deitsch Testiles, Inc. v. N.Y. Properties Ins. 62 N.Y. 2d 999,468 N.E. 2d 669, 670 (1984)

Frankenmuth presented no evidence that the plaintiffs intentionally misrepresented their claims. At best, at trial it was shown that there were some conflicting evaluations as to the extent of property damage and the amount thereto. However,

due to the extent and complexity of the damage to the plaintiffs' farm business, expert evaluations were necessary and naturally conflicted to some degree. The need for expert evaluation was even supported by the defendant's own adjusting company, by Larry Mours. However, conflicting evaluations do not rise to the level of intend necessary for the finding of misrepresentation. Frankenmuth fell far short of any evidence presented on the element of intentionally deception. Likewise, Frankenmuth did not put any evidence on at the trial that the alleged intentional deceptions induced Frankenmuth to act upon the statements to its pecuniary damage.

Lastly, Frankenmuth is estopped from asserting any misrepresentations in regards to the Proof of Losses filed by the Zahrans. Equitable estoppel is present if "action or non-action on the part of one against whom the estoppel is asserted which induces reliance thereon by another, either in the form of action or non-action to his detriment." Worthington v. Farmer's Inns. Exchange, 77 Wis. 2d 508, 515, 253 N.W. 2d 76 (1977). This same theory of equitable estoppel was applied in Omaha Paper

Stock Co., v. California Union Ins. Co., 262 N.W. 2d 175, 200 Neb. 31 (1978).

The court in Omaha stated that when an insurance company is in possession of rights secured by contract and does something inconsistent with the existence of those rights or with their intention to rely upon it, an insurance company is precluded from afterwards claiming anything by reason of it. 262 N.W. 2d at 180. The court in Omaha ruled that the defendant-insurance company was estopped from utilizing the defense of material misrepresentation due to the fact that the insurance company made no attempt to examine the remains of the insured property to ascertain the amount of said damage. 262 N.S. 2d at 180.

The Omaha facts are analogous to the case at bar. This is, Frankenmuth has been estopped from asserting any material misrepresentations regarding the Proofs of Loss because Frankenmuth failed to have an expert engineer ascertain the amount and the extent of damage at the Zahran farm. Frankenmuth had ample opportunity to dispute the Zahrans[claim based upon expert engineering evaluations. However,

Frankenmuth failed to accomplish same. Instead, Frankenmuth relied upon the Zahrans to supply "expert evaluations" in assessing the loss. Therefore, Frankenmuth has been estopped from asserting misrepresentations based upon the Zahrans' evaluations due to the fact that Frankenmuth failed to involve its own experts until after litigation was commenced.

Moreover, Frankenmuth should be precluded from utilizing the plaintiffs' Proof of Losses when they in fact disputed the contents of those Proof of Losses all along. It has been hold that when an insurer is not influenced in anyway by Proofs of Loss and rejected the Proofs of Loss in total or in part, the insurer is not prejudice by same and, therefore, misrepresentation must fail. 262 N.W. 2d at 179-80. Based upon its own inadequate investigation or failure to put forth an investigation, Frankenmuth simply requested the plaintiffs' Proofs of Loss in total and some in part. Particularly, Frankenmuth rejected the Zahrans' claim for total loss of barn 151, 152 and the slurry tank. By these rejections, the insurance company is not influenced in anyway by said claims. This is, Frankenmuth was not induced to act upon these Proofs of Loss

but instead by its choice decided to reject same. As stated above, this does not rise to the level of misrepresentation nor was any evidence presented at trial in this regard.

Moreover, Frankenmuth failed to show materiality in the use of the proofs of loss. Therefore, the use of the Proof of Loss for fraud is incongruous because the element of materiality has not been met.

Summarily, Frankenmuth failed to produce virtually any evidence in regards to the elements of misrepresentation. Likewise, Frankenmuth is estopped from asserting misrepresentations based upon the Proofs of Loss submitted by the Zahrans for the foregoing reasons. As such, the plaintiffs respectfully request a new trial on the issue of misrepresentation.

B. Overvaluation of the amount and extent of damage does not constitute fraud by the Zahrans.

It has been long established law in the State of Wisconsin that an overvaluation of the property claimed does not in itself constitute fraud. Said overvaluation must be false and such false statement must be made with the intent to deceive the insurer. Stebane Nash Co., v. Capbellsport Mut'l

Ins. Co., 27 Wis. 2d 112, 124-25, 133 N.W. 2d 737 (1964); and, Juneau Store Co. v. Badger Mut'l Fire Ins. Co., 216 Wis. 342, 350, 257 N.W. 144 (1934).

It is anticipated that the defendant will made the argument that the plaintiffs overvalued the extent and the amount of their damages. However, without conceding that the plaintiffs overvalued their claim, assuming arguendo, said argument is not sufficient in the finding for misrepresentation. As stated to the jury in the jury instruction on misrepresentation, "an exaggeration of value as mere opinion, a mere misstatement based upon an erroneous estimate of value, an honest mistake, an innocent overvaluation lacks the essential element of fraud and does not operate to void the policy." Other courts have held that comments of exaggeration and valued judgments will be made in regards to amounts claimed on insurance policy. However, this will not establish false swearing. Yates v. State Farm Fire and Casualty Co. 417 F. 2d 767 (5th Cir. 1969) The same is true of the fact that even though a reasonable value of property is less than submitted in a Proof of Loss, said difference does not itself constitute

misrepresentation. Royal College Shop v. Northern Ins. Co. of New York, 895 F. 2dn 670, 672 (10th Cir. 1990)

It may have come out in trial that certain, amounts on properties were subject to overvaluation. However, most, if not all evaluations, were relied upon by the plaintiffs through third party estimates. Furthermore, the remainder of said claims were based upon the plaintiffs own knowledge as to the value of these items less some amount of depreciation. This in itself does not constitute misrepresentation.

Furthermore, the fact that an insured submits a certain dollar amount and later reduced that amount or eliminates the claim completely does not in itself constitute fraud.. Bohn v. Louisiana Farm Bureau Mut'l Ins. Co., 482 So. 2d 843, 853-54 (La App. 2 Cir. 1986) and G.U. Rybiski and Co. v. Louisiana Coastal Underwriters of Autobahn Ins. Co., 369 S. 2d 1097, 1100 (La App. 1 Cir. 1979)

It is anticipated that the defendants will make this argument that they offered evidence showing that the plaintiff made a claim for a manure tank pump and then withdrew said

claim and, therefore, a finding of misrepresentation was appropriate.

However, ample evidence was put on the record in support of the proposition that the plaintiffs, after later discovering the pump in the manure and finding that said pump eventually worked after certain repairs, the Zahrans withdrew said claim as evidence by lack of the claim in their final Proof of Loss dated September 23, 1989. Therefore, a reduction or withdraw of a claim by the plaintiff does not in itself constitutemisrepresentation. For the foregoing reasons, overvaluation and /or reduction in a claim does not constitute fraud entitling the defendant to judgment on the verdict for misrepresentation.

C. Plaintiffs did not receive a fair trial and, therefore, the court has the inherent right to set aside the jury verdict and order a new trial.

Just prior to the close of the parties cases in chief, there was a conference held between the court's clerk and counsel for the respective parties on December 20, 1991 regarding the special verdict and jury instructions. At said conference,

plaintiffs objected to the inclusion of the question on misrepresentation both on the basis of form and on the basis that the defendant failed to put forth adequate evidence on said issue. Immediately upon plaintiffs' objection, defense counsel for Frankenmuth vigorously argued that there was more than ample evidence in the record to support the question on misrepresentation. (See Affidavit of Christopher A. McConville).

Then, on December 24, 1991, after the defendant requested the removal of Question 5(b) of the special verdict, the defendant left the door open to modify the special verdict and, as such plaintiffs' counsel reiterated its arguments in regards to the first question on the verdict for misrepresentation. These objections included the following: lack of evidence in support of said claim; the form of the claim which should have gone to separate items insured; and, the fact that jury should not be precluded from answering the bad faith questions regardless of its answer as to misrepresentation.

Fraud on one portion of an insurance contract does not void other valid portions of the insurance contract. Johnson v.

Southstate Ins. Co., 341 S.E. 2d 793, 794 (S.C. 1986). Johnson was a case in which the court held that fraud concerning the contents of a dwelling was properly voided, however, recovery was not defeated on the dwelling in living expenses because fraud did not effect these items. 341 S.E. 2d at 794. The rational is a forfeitures of insurance contracts in total are not favored. This is in keeping with the court's language in Tempelis which stated that wholesale of voidance of a policy works a substantial hardship on insurers. 164 Wis. 2d at 28.

It was plaintiffs' argument that the defendant would be hard pressed to identify any specific item in which the plaintiff had committed fraud. Assuming arguendo, separate questions in regards to misrepresentations on the items under the insurance policy should have been set forth within the special verdict. Essentially, this is the same treatment which was given the plaintiff in their claims for bad faith. the jury should not have been mislead to believe that an overvaluation on one items would void the whole policy. This is inconsistent with the

recognition by Wisconsin that said circumstance works a substantial hardship on insureds like the Zahrans.

Likewise, the jury should have been given the opportunity to consider the issue of bad faith and breach of contract. The jury may well have concluded fraud on one item and/or concluded that Frankenmuth was estopped from asserting fraud and then found bad faith. However, the jury was never provided this opportunity. As such, this failure created an unfair and unjust result for the Zahrans.

Furthermore, plaintiffs counsel also posited the argument that if misrepresentation were found, the court, on motions after verdict, would be hard pressed to find items within the contract to void the insurance contract. This is mainly due to the nature of claims already having been paid by the insurance company in the estimated value of $182,000.00. The court had indicated that it certainly would not order the plaintiff to refund sums that were paid voluntarily by the insurance company. Nevertheless, an insurmountable hurdle of establishing an equitable time frame and items within the insurance contract to void is not being imposed by an

incomplete jury verdict. As such, an unfair result has occurred to the detriment of the plaintiffs, therefore, requiring a new trial.

Secondly, plaintiffs did not receive a fair trial in the court's decision to allow evidence and references to Frankenmuth's payment on the fire loss which occurred on July 6, 1990. The court had previously denied the defendant's motion to consolidate claims of the plaintiffs on the wind loss and the fire loss. However, at trial, the court allowed testimony in regards to claims paid by Frankenmuth on the fire loss claim. The unexpected ruling at trial was prejudicial to the plaintiffs. This submission into evidence at the very least, left the inference to the jury that the plaintiffs were making unlawful claims on property in which they were already paid due to the fire loss. The jury could have concluded that the plaintiffs were intentionally making claims that had been reimbursed.

The court also excluded evidence in reference to a $25,000.00 offer that Mr. Spaulding was considering making to the Zahrans through Larry Mours of GAB. It is this type of low ball, generalized and unspecified potential payment that reflects directly on the insurance company's bad faith conduct. That is,

this evidence shows that Frankenmuth intentionally attempted to put forth unfair claims settlement practices in resolving the Zahrans' claim for bad faith rather than discussing specific claims. A refusal to allow said evidence on the record works a substantial injustice to the plaintiffs for a fair trial.

Lastly, although the court has a fair amount of discretion in its ability to maintain the court calendar, the court, after the onset of the trial, limited each party to nine hours of testimony which would included the case in chief, both direct and cross examination. Rebuttal testimony had not been mentioned. This time limitation worked an extreme injustice and hardship upon the plaintiffs in such a complex and multiple claim bad faith case. In addition, the plaintiffs were precluded from putting on any rebuttal testimony. The court precluded plaintiffs from putting on testimony the insurance company's defenses as well as testimony rebutting the counterclaim of misrepresentation. For the foregoing reasons, the plaintiffs respectfully request the court to order a new trial on the issues of bad faith, breach of contract, misrepresentation and punitive damages.

III. ALTERNATIVELY, JUDGMENT NOTWITHSTANDING THE VERDICT IS APPROPRIATE

ON THE ISSUE OF MISREPRESENTATION, BREACH OF CONTRACT AND BAD FAITH.

Where there is not substantial evidence to support the verdict, judgment notwithstanding the verdict is appropriate. Allen and O'Hara, Inc. v. Barrett Wrecking, Inc., 898 F. 2d 512, 515 (7th Cir. 1990) As stated previously, the defendant has failed to put forth evidence in regards to the elements of fraud to support the verdict of misrepresentation. Frankenmuth falls far short of providing substantial evidence in support of this verdict, much less any evidence in that regard. As such, Question N. 1 in the special verdict should read "no" instead of "yes".

Plaintiffs also respectfully request the court to enter judgment notwithstanding the verdict on the issues of breach of contract and bad faith. The plaintiffs put forth substantial evidence showing that Frankenmuth had breached its contract of insurance and committed bad faith in their failure to put forth an adequate investigation of their claim for the wind loss. More particularly, Larry Mours of GAB, an adjuster hired by Frankenmuth, indicated in his opinion that an expert engineer

was necessary at the onset of this claim to properly evaluate the plaintiffs' loss. An expert was not hired by Frankenmuth even after the insistence of Larry Mours.

The cross-examination of Mr. Spaulding conclusively showed he had no basis for the payment of $14,000.00 made on August 7, 1989 over the name of the retired adjuster. He, in fact transferred $4,000.00 from building 151 to 152.

Therefore, the plaintiffs respectfully request the court to find for the plaintiffs in a judgment notwithstanding the verdict on the issues of breach of contract and bad faith and award damages according to proof provided at trial.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request the court or order a new trial on the issues of misrepresentation, breach of contract and bad faith or, in the alternative, judgment notwithstanding the verdict.

Dated this 6th day of January, 1991.

KMIEC LAW OFFICE
Attorneys for Plaintiffs
By:_____

Marjan R. Kmiec (signed)
By:_____
Christopher A. McConville(signed)

P.O. Address:
Kmiec Law Offices
3741 West National Avenue
Milwaukee, WI 53215
(414) 649-9790